



Undermining the International Criminal Court

Dore Gold and Alan Baker, eds.



Jerusalem Center for Public Affairs

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INTRODUCTION

Amb. Alan Baker

As early as the late 1950s, following the Holocaust of the Jewish People by Nazi Germany and its collaborators, Israel was one of the founding fathers of the post-Second World War vision of a permanent international criminal tribunal.

The vision was to establish a juridical body to adjudge the “most serious crimes of concern to the international community as a whole.” As such, from the early 1950s and up to the adoption of the International Criminal Court’s Statute at the Rome Conference in 1998, Israel took an active and central part in the process of negotiating and drafting the court’s founding documents.

The preambular provisions of the Statute indeed stressed the noble and solemn determination of the States parties “for the sake of present and future generations, to establish an independent, permanent international Criminal Court.”

The very nature and purpose of such a central, independent and vital juridical body to adjudge the most serious crimes of international concern would imply that such a body would be completely independent of pressures and influence, and immune from politicization. One might have assumed that the international community would not permit any attempt to prejudice the Court’s integrity, credibility and authority through political abuse and manipulation.

However, for several years, the Office of the Prosecutor of the International Criminal Court has been deluged with complaints by the Palestinian leadership, purporting to represent a non-existent “State of Palestine.” Such a huge volume of complaints are part of the ongoing Palestinian attempts to delegitimize the State of Israel in the institutions of the international community, including the ICC, through the cynical abuse and manipulation of those institutions.

After conducting preliminary inquiries into the many Palestinian referrals, the Prosecutor formally confirmed, in February 2020, her intention to open a formal investigation into the “Situation of Palestine.”

From the earliest days following the establishment of the Court, and following the completion of the drafting of the Court’s Statute, Israel found itself obliged to express concern at attempts to politicize the Court through political abuse and manipulation, including the insertion into the Court’s Statute of clearly political provisions directed against Israel.

Following the adoption of the ICC Statute, Judge Eli Nathan, Head of Israel's delegation to the 1998 Rome Conference, explained why Israel was obliged to vote against its adoption:

We regret being obliged here today to vote in a way that prevents us, as victims of genocide, and as founding fathers of the concept and idea of the International Criminal Court, to vote in favor of its Statute.

We still maintain the hope that somewhere, good sense will prevail and the International Criminal Court, which is to be established as a result of all our hard work, will not become just one more political forum to be abused for political ends by an irresponsible group of states, at their political whim. We continue to hope that the Court will indeed serve the lofty objectives for the attainment of which it is being established.

From the very beginning, the Jerusalem Center for Public Affairs has been at the forefront in sounding warning alarms to the international community in light of the concerted Palestinian policy of abusing the ICC and turning it into its own, private back-yard Israel-bashing tribunal.

Following the initial Palestinian attempt, in 2009, to engage the Court, through its declaration recognizing the Court's jurisdiction, the President of the Jerusalem Center, Ambassador Dore Gold, submitted to the Office of the Prosecutor on October 20, 2010, a note questioning the legality of the Palestinian declaration in light of statutory requirements, and historic and diplomatic considerations.

Similarly, immediately following the Palestinian transmission of documents to the Secretary General on January 2, 2015, requesting accession to the Rome Statute as a state, Ambassador Alan Baker, head of the International Law Program of the Jerusalem Center, submitted a letter to the UN Secretary General, the UN Legal Counsel, and the ICC Prosecutor, pointing to the inherent legal inconsistencies in accepting the Palestinian request, undermining the very integrity of the Court.

This monograph is a compilation of relevant articles and studies published by the Jerusalem Center, including the above-noted submissions by Ambassadors Gold and Baker, detailing the extent of the political abuse and manipulation of the Court, and the extent to which the Court's Prosecutor has actively played along and even encouraged such Palestinian abuse.

AVERTING PALESTINIAN UNILATERALISM: THE INTERNATIONAL CRIMINAL COURT AND THE RECOGNITION OF THE PALESTINIAN AUTHORITY AS A PALESTINIAN STATE

Ambassador Dore Gold with Diane Morrison

Executive Summary

- » The Palestinian Authority's January 22, 2009, declaration to the Office of the Prosecutor of the International Criminal Court amounts to an official request to confirm that the PA can be considered as a state for purposes of ICC jurisdiction.
- » Yet the 1995 Israeli-Palestinian Interim Agreement which created the PA established a fundamental principle: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations."
- » It is at least doubtful that the ICC would want to become involved in an attempt to effect a material breach of the only valid and legally binding framework that has governed, and continues to govern, the relationship between Israel and the Palestinians.
- » If the Palestinian Authority, acting as a non-state entity, succeeds in achieving standing in the ICC, then any political community contemplating a move to political independence or statehood will be motivated to follow suit. The Chechens, Basques, Tibetans, Sudanese Christians, and Kurds immediately come to mind.
- » While some academics try to argue that a State of Palestine existed following the demise of the Ottoman Empire and the creation of the British Mandate, the Palestinian Arab leadership at the time saw their country as part of Southern Syria and their demand was for the reconnection of Palestine with Syria rather than for an independent Palestinian state.
- » The Principal Allied Powers that drafted the postwar Treaty of Sèvres and the Mandate for Palestine in 1920 did not specifically assign political rights to the local Arab population, but clearly promoted the re-establishment of a Jewish "national home."
- » To retroactively revise the political status and reinvent the area as an already existing Arab state or as a precursor to a would-be Arab state of Palestine would be tantamount to wiping out the historical and legal roots of the State of Israel and the internationally recognized rights of the Jewish people to a homeland in Palestine.
- » Finally, inserting the issue of ICC jurisdiction into the present environment in Israeli-Palestinian negotiations is likely to fortify Palestinian intransigence at the peace table, since PA negotiators will feel that they can fall back on unilateralist options instead of compromising in order to reach an agreement.

The Palestinian Authority Submission to the International Criminal Court

On January 22, 2009, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) received an official communication from the Minister of Justice of the Palestinian Authority (PA), Ali Kashan, which expressed the PA's readiness to recognize the jurisdiction of the ICC over "the territory of Palestine."¹ The PA's declaration made no mention of the war in the Gaza Strip which took place between December 27, 2008, and January 18, 2009, though it appeared to come on the heels of that conflict.

Formally, the PA declaration purported to invoke Article 12 (3) of the Rome Statute which originally established the court, which specifically enables a "state" which is not a party to the treaty to request that the ICC exercise its jurisdiction on an *ad hoc* basis with respect to an alleged crime on that state's territory or involving its nationals. The PA's declaration raises several issues of concern – legal, historic, and diplomatic.²

Can the Palestinian Authority Argue that It Already Constitutes a State?

It is clear that Palestine is not a state, despite the considerable political support that the cause of Palestinian statehood has enjoyed in recent years. As Professor James R. Crawford of Cambridge concluded in his monumental work, *The Creation of States in International Law*, "The State of Palestine has not yet become a fact as distinct from an aspiration."³ Nor was there a state of Palestine in the past. When the Ottoman Empire lost its Asiatic provinces in 1917, Britain took control of a number of territories in the region, including parts of Ottoman provinces, which it would incorporate into a new geographic entity, placed under its control as the Mandate for Palestine. When Britain withdrew its forces from Mandatory Palestine in 1948, the State of Israel was established in part of that territory, while the remaining parts of that territory (known today as the "West Bank" and the "Gaza Strip") were immediately invaded and occupied by neighboring Arab states. Thus, when Israel captured the West Bank and the Gaza Strip in the 1967 Six-Day War, there was certainly no Palestinian state on those territories, or anywhere else. At the time, each territory was under the control of Jordan and Egypt, respectively.

While the Oslo Accords signed in the 1990s between Israel and the Palestine Liberation Organization (PLO) resulted in the establishment of, and transfer of limited powers to, a newly created Palestinian Authority, this did not create Palestinian statehood in any part of the West Bank and the Gaza Strip. The Palestinian Authority today, whose Minister of Justice approached the ICC in 2009, may also not be considered a state.

In 2005, the U.S. Court of Appeals for the First Circuit considered the issue when it upheld a default judgment against the PA which sought to invoke a right of sovereign immunity from a lawsuit emanating from the murder of U.S. nationals who were killed in a terrorist act.⁴ The U.S. court found that "Palestine was not a state" and therefore dismissed the argument made on behalf of the PA.

A similar view on the matter of statehood is also clearly evident in the 2004 advisory opinion from the International Court of Justice (ICJ) on the legality of Israel's security fence. In that case, the ICJ specifically referred to the requirement for "efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian state, existing side by side with Israel and its other neighbors, with peace and security for all in the region" (at para.162).

Furthermore, the ICJ even rejected the possibility of Israel's reliance on Article 51 of the UN Charter and the right of self-defense on the basis that Article 51 could only apply to "the case of armed attack by one State against another State."⁵ While this restrictive approach to Article 51 can be criticized, it is clear that the ICJ was firmly of the view that a Palestinian state was not already in existence. PA Minister Kashan might have sought to sidestep this inconvenient problem of the PA's status by writing to the ICC in the name of the "Government of Palestine," but his letterhead was still officially that of the "Palestinian National Authority" – the name the Palestinian side uses for the PA.

The fact remains that when Israel signed the Declaration of Principles in 1993, also known as the Oslo Agreement, and its subsequent implementation accords during the 1990s, the Palestinian side was formally represented by the PLO, and not by the PA, which notably did not undertake international commitments for the Palestinians. Indeed, it was the second Oslo implementation accord, the 1995 Israeli-Palestinian Interim Agreement,⁶ which created the "Palestinian Interim Self-Government Authority" (known as the Palestinian Authority, or PA) (Article III, 1)⁷ and provided for the transfer of certain limited powers to it, while expressly reserving to Israel all powers not so transferred (Article I, 1).⁸

The PA Declaration and the Erosion of Binding Israeli-Palestinian Agreements

The PA declaration poses a number of diplomatic challenges. The 1995 Interim Agreement specifically provides that the Palestinian Authority "will not have powers and responsibilities in the sphere of foreign relations" (Article VII, 5, a),⁹ which were retained by Israel. Exceptionally, the PLO was designated as the party that could conduct negotiations and sign agreements with states or organizations on behalf of the PA; however, this exception was limited to highly circumscribed areas related to the economy, development, cultural matters, science, and education.

In addition, under the Oslo Agreements, Israel expressly retained exclusive criminal jurisdiction over all Israelis and, in addition, the agreements defined and limited the jurisdiction transferred to the PA over Palestinians both in those territorial areas that were and those that were not transferred to it.¹⁰

However, the PA's declaration amounts to an official (even if implied) request to confirm that the PA can be considered as a state for purposes of ICC jurisdiction. Yet the Interim Agreement established in its Final Clauses (Article XXXI) a fundamental principle: "Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the Permanent Status negotiations."¹¹

These obligations were supported by important components of the international community, including the European Union, the Russian Federation, the U.S., Egypt, and Norway, which were in fact signatories to the Interim Agreement in their capacity as witnesses. It is at least doubtful that the ICC would want to become involved in an attempt to effect a material breach of the only valid and legally binding framework that has governed, and continues to govern, the relationship between Israel and the Palestinians.¹²

These obligations from the Interim Agreement create a dilemma for the Palestinian Authority. A unilateral declaration of statehood, instead of a negotiated solution to the conflict, would not only be a treaty violation, but could affect international reactions to the newly created Palestinian state. For example, states strictly adhering to international law would have grounds to deny the Palestinian state recognition. After all, there is a general principle of law, noted by Professor Malcolm Shaw, that an “illegal act cannot produce legal rights.”¹³

According to the Restatement of the Foreign Relations Law of the United States, a state is required not to recognize or treat as a state any entity which has “attained the qualifications of statehood in violation of international law.”¹⁴

To circumvent this problem, the Palestinian Authority might attempt to be conferred with statehood by others, especially by international institutions that decide it already has the attributes of a state. The ultimate action in this regard would be a decision by the UN Security Council, which determined a Palestinian state already existed and should be recognized. The PA’s involvement of the ICC in establishing that it be defined as a state should be seen as the first step in a decision to move in this strategic direction.

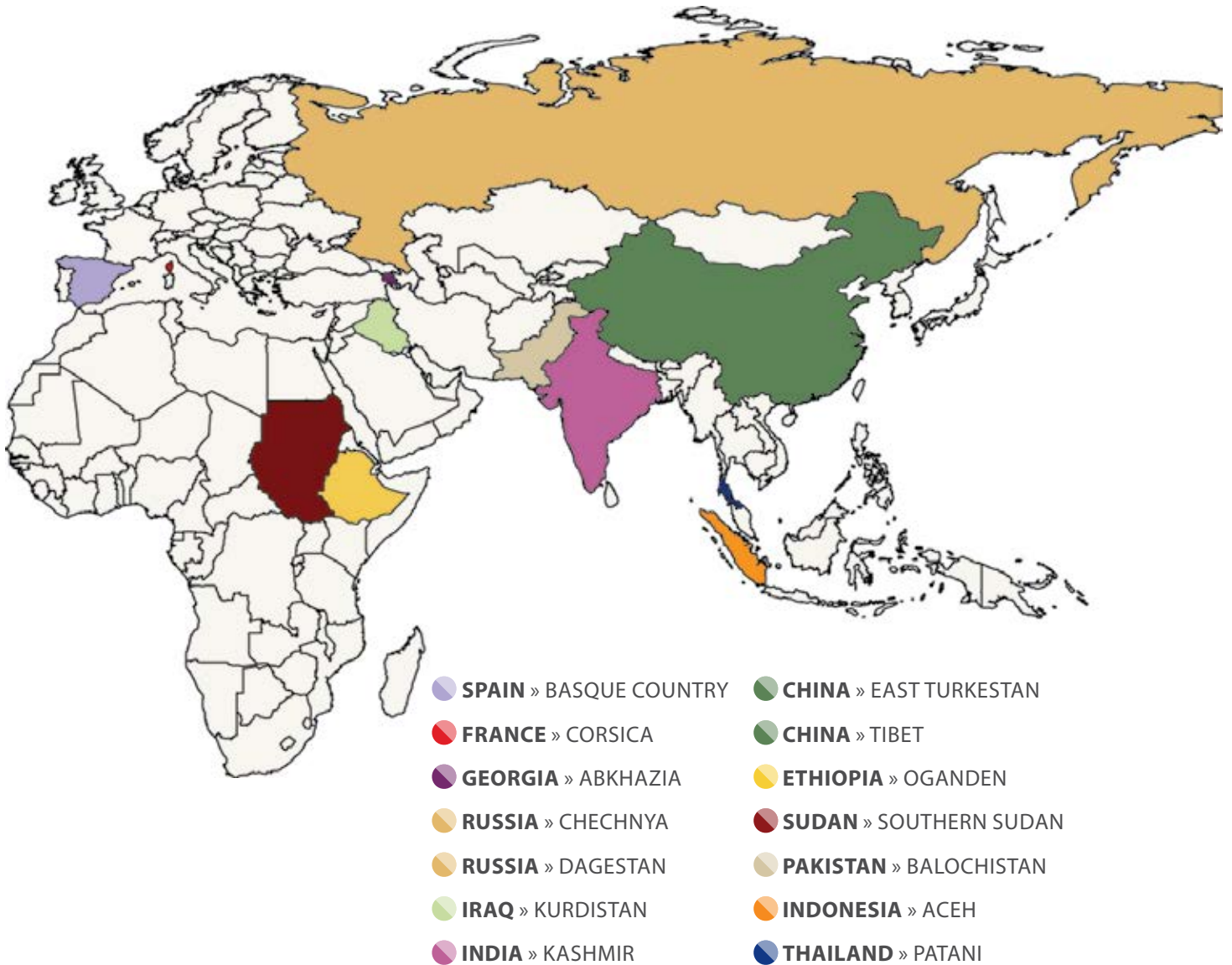
In general, the Palestinian Authority's attempt to involve the ICC in its dispute with Israel is in fact part of a wider and long-running campaign to pursue the Palestinian cause in complete disregard, and at the expense, of the most basic rules and procedures of international institutions. These attempts – to which I was sadly and all too often a witness in my capacity as an ambassador to the United Nations – may have succeeded in engulfing certain United Nations bodies, causing very considerable damage to the international reputation and credibility of these bodies in the process. It is not clear, however, why the ICC should go out of its way to follow suit, especially since this would require it to manipulate its own multilaterally-agreed rules and trample on binding international peace agreements between the relevant parties in order to do so.

Implications for Other Non-State Entities

There is also one other critical foreign policy issue that needs to be considered that goes beyond Israel and the Palestinians. If the Palestinian Authority, acting as a non-state entity, succeeds in achieving standing in the ICC, then any political community contemplating a move to political independence or statehood will be motivated to follow suit. Within the international community today there are dozens of internal conflicts that seek and may well result in the formation of new states. There is no reason why various political communities

will not be similarly inspired to follow the Palestinian example: the Chechens, the Basques, the Tibetans, the Sudanese Christians, and the Kurds immediately come to mind. Regardless of whether these groups have just national aspirations or causes, their differences with their central governments must ultimately be resolved through a political process.

***Selected Separatist Movements that Could Be Affected
Should Palestinian Unilateralism Be Successful***



Clearly, these causes cannot be solved by the ICC, or the ICC Prosecutor; nor, indeed, were these institutions created for such purposes. But if there is a sudden surge of unilateralism that comes about because of the precedent from the Palestinian case, then the result will not be international justice but rather increased international chaos, an erosion of diplomacy as a means for conflict resolution and, most worryingly for the ICC, embroilment of the ICC and its institutions in hotly contested internal political disputes that they were neither designed nor mandated to deal with.

Beyond these legal issues, the PA's declaration and submissions to the ICC raise important historical issues and claims that require careful examination. **The argument that a Palestinian state already exists and that its borders have already been defined might spare the Palestinian Authority from having to declare a state at present, but it is extremely problematic.** At best, these arguments are based on questionable historical evidence. In some cases, they directly undermine Israel's most important international rights:

- » **First**, in support of the Palestinian Authority's declaration, an argument has been submitted to the ICC that a State of Palestine existed following the demise of the Ottoman Empire, and that sovereignty rested with the population of Palestine at the time the Palestine Mandate was established.¹⁵ According to this theory, any new claims to Palestinian statehood are to be viewed against a background of a pre-existing Palestinian state. This argument distorts the historical record by flagrantly ignoring the recognition given by the international community at that time, through the League of Nations, to the historic rights of the Jewish people to reconstitute their national home in Palestine, as well as the confirmation of these rights by the United Nations in November 1947.¹⁶ Denial of these historical facts only reinforces the dangerous trend to delegitimize the very existence of the State of Israel, as well as the national rights of the Jewish people, which were recognized by both the League of Nations and the United Nations.
- » **Second**, PLO Chairman Yasser Arafat issued a Palestinian Declaration of Independence on November 15, 1988, following which a state of Palestine was recognized by a number of countries on a bilateral basis. However, not only did the status of the PLO Observer Mission at the UN not change in any significant way, but subsequent developments in Palestinian politics also raise questions as to whether the Palestinians themselves believe they had indeed formed a state in 1988.
- » **Third**, by accepting the PA's declaration, the ICC would be thrusting itself into the serious historic territorial disputes that exist between Israel and the Palestinians which are presently part of the core agenda of Arab-Israeli diplomacy. Where exactly is the "territory of Palestine" designated by the PA as subject to ICC jurisdiction? It is doubtful that it is the intent of the PA to refer to all of British Mandatory Palestine, for then the declaration would include Israeli sovereign territory. If the intent is to refer only to the West Bank and the Gaza Strip, then the PA is seeking ICC jurisdiction in an area that is historically disputed, subject to conflicting territorial claims, and demarcated by ceasefire lines that do not amount to recognized international boundaries, even as it is hoped that future negotiations may determine them.

Arguing against the idea that the Palestinians constitute a state at present does not preclude the idea that Israel and the PA should reach a political settlement in the future. Though the Jewish people had internationally recognized rights in British Mandatory Palestine that were in many respects stronger than those of the Palestinian Arabs, nonetheless, Israel might decide to make historical compromises over lands where its title is indisputable.

In addition, the fact that the Palestinian Authority does not constitute a state at present does not render the Gaza Strip and the West Bank a legal "black hole," precluding justice for both Israeli and Palestinian victims of violence. Israel's legal system is internationally acclaimed, with the Israeli Supreme Court praised for both its jurisprudence and its independence, with

its rulings cited favorably by foreign courts including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice. Israel's ability to independently and fairly evaluate itself was also recognized by the Criminal Chamber of the National Court of Spain.¹⁷

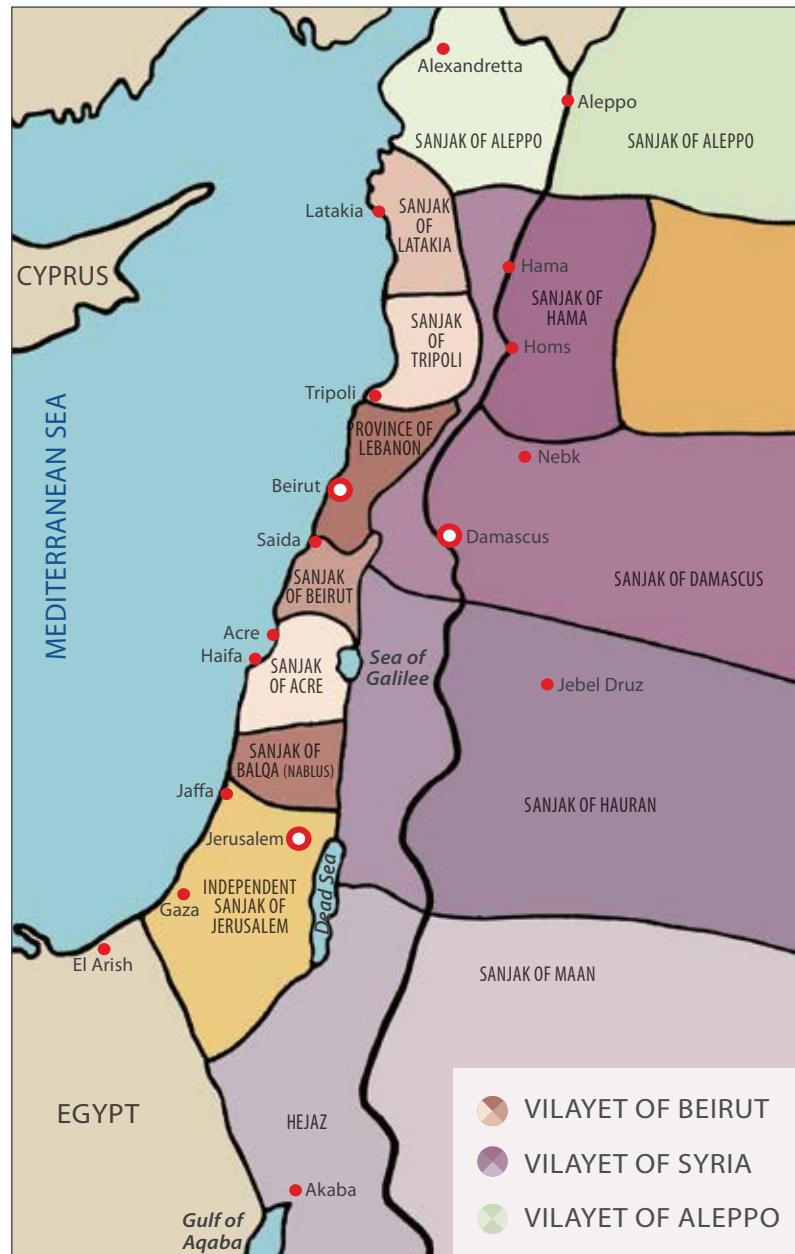
1. Contesting the Assertion of a Pre-Existing Palestinian Statehood from the Time of the British Mandate

Palestine, as a geographically distinct political unit, was a product of the First World War and the peace settlement that the Allied Powers reached in its wake. As already noted prior to the war, there was no state of Palestine. During the period between 1517 and 1917, this territory was divided between different provinces of the Ottoman Empire. In the late nineteenth century, the largest of these provinces was part of the *Vilayet* (district) of Beirut, which ran southward from modern-day Lebanon to an east-west line running from the Jordan River to the town of Jaffa.¹⁸ The territory that was to become Palestine was also known in Arabic as *Surya al-Junubiyya* (Southern Syria).¹⁹ It is, therefore, not surprising that assertion of a separate Palestinian (Arab) national identity actually developed much later.

Indeed, the central demand initially voiced by the local Arab population after the First World War was for the reconnection of Palestine with Syria rather than for an independent Palestinian state. During this formative period it was common for the Palestinian Arab leadership to see their country as part of Southern Syria.²⁰ This theme was to persist up until the 1960s.²¹ To say that Palestine emerged as a distinct state after the First World War certainly does not take into account the thinking of its residents at the time. It involves assigning to that period a political consciousness that only emerged decades later.

This fact is confirmed by international diplomacy at the time. At the end of the First World War, the Arab national movement, led by Amir Faisal and the Hashemite family in Mecca under King Hussein, spoke for all the Arabs of the Ottoman Empire. The core bargain that appeared to be emerging in 1919 was that if the Arab nationalist movement would receive a large Arab state covering what is today Syria, Iraq, and the Arabian Peninsula, then Faisal would be prepared to accept a Jewish national home in Palestine in accordance with the 1917 Balfour Declaration.²²

Internal Ottoman Districts Prior to the Establishment of British Mandatory Palestine



As a British Royal Commission wrote at the time: "If King Hussein and the Emir Faisal [*sic*] secured their big Arab State, then they would concede little Palestine to the Jews."²³ This was also the *quid pro quo* contained in the Faysal-Weizmann Agreement in 1919.²⁴ This understanding was ultimately undermined by French actions in Damascus that led to Faisal losing Syria and becoming King of Iraq. But that did not alter the perception of Britain and the Great Powers that on the whole a fair compromise had been struck. As Lord Balfour, himself, stated in July 1920, Britain had liberated the Arabian Peninsula and Iraq, indeed much of the Arab world, from the Ottoman Turks, hoping the Arabs would not "grudge that small notch" which was to be given to the Jewish people.²⁵

This was also the political context of the legal rights that were established in British Mandatory Palestine at that time. In 1919, Article 22 of the Covenant of the League of Nations formally introduced the idea of mandated territories in the defeated Ottoman Empire: "certain territories detached from Turkey" would be "provisionally recognized" as "independent nations" subject to the advice and assistance they would receive from the Mandatory Powers. With the Treaty of Sèvres, signed in August 1920, the Ottoman Empire relinquished sovereignty over its Asiatic territories to the south of modern day Turkey.²⁶ According to Article 94 of the Treaty of Sèvres, Syria and Mesopotamia (Iraq) were to be "provisionally recognized as independent states subject to the rendering of advice and assistance by a mandatory until such time as they are able to stand alone."

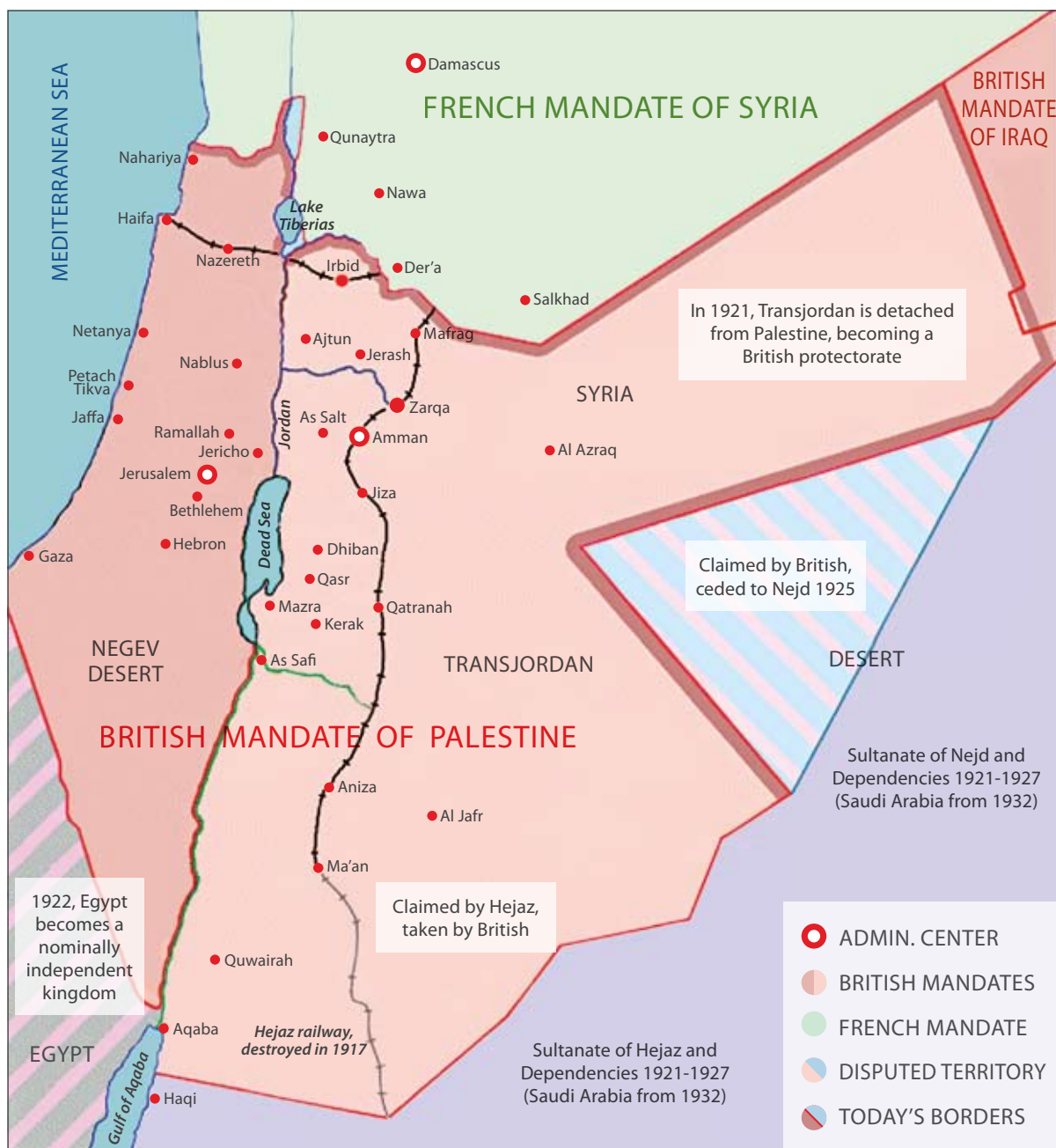
Yet with regard to Palestine, no such provisional recognition was given to it as an independent state. Instead, the Treaty of Sèvres reaffirmed the Balfour Declaration of November 1917 in favor of the establishment of a national home for the Jewish people. This distinction between Syria (including Lebanon) and Mesopotamia (Iraq), on the one hand, and Palestine, on the other, would continue in the language of the diplomatic instruments creating all three League of Nations mandates in the years that followed.²⁷

True, the mandates for Syria, Mesopotamia, and Palestine were all categorized by the Allied Powers as "Class A Mandates" which, according to Article 22 of the Covenant of the League of Nations, meant that they had "reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone." But to use this clause to ascribe to the Palestine mandate a status that is the same as the other mandates would be a mistake. Sir Hersch Lauterpacht noted that all three are Class A Mandates, but he cautioned: "It would however be wrong to think they are uniform entities in internal, constitutional and administrative law."²⁸ In the words of one international legal expert, it is best to think of the Mandate for Palestine as "*sui generis*' among mandated territories."²⁹

The Mandate for Palestine, which was formally approved by the League of Nations on July 22, 1922, was even more explicit about Jewish national rights than the Treaty of Sèvres. In the third clause of its preamble, it states: "Whereas recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country." While a specific clause regarding independence was included in the draft Mandate for Iraq, and the mandate document for Syria and Lebanon, in accordance with Article 22 of the Covenant of the League of Nations, no such clause appeared in the Mandate for Palestine, where the League of Nations had undertaken an international commitment to the Jewish national home.³⁰

The Principal Allied and Associated Powers that drafted the language of the Treaty of Sèvres and the language of the Mandate for Palestine, when they met in San Remo, Italy, in April 1920, did not create the rights of the Jewish people with those documents, but rather recognized a pre-existing right, referring to the Jews as "reconstituting their national home." They did not ignore the non-Jewish residents, but, in the language of the mandate, sought only to protect their "civil and religious rights."

British Mandatory Palestine, 1922



Thus, the mandate did not specifically assign political rights to the local Arab population, but clearly promoted the re-establishment of a Jewish national home. Furthermore, the rights of the Jewish people that were recognized in the mandate document did not end with the dismantling of the League of Nations, but rather were preserved, in the modern period, by the United Nations, which determined under Article 80 of the UN Charter that there was no intention by the UN to alter the existing rights of any states or any peoples.

The central question, therefore, becomes: how did the Great Powers interpret Jewish national rights? What did the Great Powers intend when they committed themselves to the “re-establishment of a Jewish national home?” Three months after he issued his famous declaration in 1917, Lord Balfour admitted: “My personal hope is that the Jews will make good in Palestine and eventually found a Jewish state.”³¹ President Wilson received intelligence recommendations prior to the 1919 Paris Peace Conference that assessed: “It will be the policy of the League of Nations to recognize Palestine as a Jewish state as soon as it is a Jewish state in fact.”³²

Finally, the French government also drafted regulations for the Paris Peace Conference in 1919 which included “nationalities in the process of forming states which had not yet been recognized.” They included Yugoslavs, Finns, Arabs, Armenians, and the Jews of Palestine.³³ In short, there was a general awareness among the Great Powers after the First World War that a Jewish national home would lead to a Jewish state.

The recognition of the need to re-establish a Jewish homeland started to receive support from important legal authorities even before the First World War. Rev. William Blackstone of Illinois prepared a petition in 1891 for President Benjamin Harrison that described the connection of the Jewish people to Palestine: “It is their home – an inalienable possession from which they were expelled by force.”³⁴ The petition was supported at the time by 413 prominent Americans including Melville Fuller, Chief Justice of the U.S. Supreme Court and subsequently by Justice Louis Brandeis, who asked Blackstone to prepare a second petition for President Woodrow Wilson.

Ernst Frankestein, a British-based authority on international law in the inter-war period, who became one of the founders of a European Code of Private International Law, made the legal case for Jewish rights in Palestine in a similar fashion by stating that the Jewish people never relinquished their title after the Roman conquest of their commonwealth.³⁵ For that to have happened, the Romans and their Byzantine successors would have had to have been in “undisturbed possession” of the land, with no claims being voiced, which did not occur given the continuation of Jewish resistance for centuries thereafter.³⁶

The rights of the Jewish people that were now expressed by both internationally approved San Remo documents – the Treaty of Sèvres and the Mandate for Palestine – had important legal significance. Judge John Bassett Moore of the Permanent Court of International Justice stated in his dissenting opinion in the *Mavrommatis* case that the mandate's recognition of Palestine as a Jewish national home was “a Legislative Act” of the Council of the League of Nations.³⁷

Before his accession to the U.S. Supreme Court, Felix Frankfurter wrote in the same spirit that with the Mandate for Palestine, the Balfour Declaration was “made part of the law of nations, and thereby the establishment of a Jewish national home became an international obligation.”³⁸

The Treaty of Sèvres was not ratified by the Ottoman Empire, which was replaced by the Republic of Turkey. However, the new Turkish government signed a new agreement, the Treaty of Lausanne, in 1923, re-confirming its renunciation of “all rights and title” with respect to territories beyond the frontiers of the Republic of Turkey (Article 16).³⁹

But who then actually had sovereignty in British Mandatory Palestine after it was relinquished by Turkey? An argument has been made that “sovereignty rested with the population of Palestine and that Palestine was a state.”⁴⁰ This suggestion, however, contradicts the views of the leading scholars of the time who reviewed this issue, and whose legal theories have also been confirmed by current legal experts. In his analysis of the mandate system at the time, Lauterpacht concluded that sovereignty “lies with the League of Nations and is derived from it.”⁴¹ The famous jurist Lord Arnold McNair, who came to be a judge and president of both the International Court of Justice and the European Court of Human Rights, wrote: “The conclusion in this controversial matter which commends itself to us is this: that the rights, powers and interests which make up the relationship of the normal State towards its territory and the inhabitants belong in the case of the mandated areas in part to the mandatory, while the remainder are reserved to the League.”⁴²

Quincy Wright wrote in the *American Journal of International Law* in 1923 that it would be accurate “in ascribing sovereignty of mandated territories to the mandatory [in this case Britain] acting with the consent of the League of Nations.”⁴³ Wright reached this conclusion by analyzing the internal and external aspects of sovereignty, which he saw as being the power to amend the mandate (internal act of sovereignty) and the power to alienate or transfer the mandate (external aspects of sovereignty).⁴⁴ His view that ascribed sovereignty in mandated territories to the mandatory acting in consent with the League of Nations was confirmed when the Mandate of Palestine was amended so that in two-thirds of its territory – the territory of the East Bank, which would eventually become the Hashemite Kingdom of Jordan – the provisions calling for the establishment of a Jewish national home would not be applied. This case of state practice demonstrated Wright's contention in an area that is a major expression of national sovereignty.

A second argument has been made that once the territory that made up British Mandatory Palestine was set aside by the League of Nations as an entity separate from the other districts of the former Ottoman Empire, a state had essentially been formed, or at least an entity enjoying some of the attributes of a state, including the power to issue passports and conclude treaties. The practices and powers enjoyed by British Mandatory Palestine, however, lead to quite the opposite conclusion: for example, while British Mandatory Palestine issued passports, its residents relied on Britain for diplomatic protection when they traveled abroad and needed to rely upon British consulates and embassies, since the mandatory government did not open any foreign representations.⁴⁵

These formal arguments, however, miss the central weakness in the claim that a Palestinian state already existed from the time of the British Mandate: that pre-state entity was – and was recognized as – an expression of Jewish national rights, and was, in fact, the precursor to the modern State of Israel, whose claims to sovereignty are in part based on it. The stated intent of the Great Powers who drafted the mandate instrument and the concomitant Ottoman surrender of sovereignty were to create a Jewish national home, which would inevitably become a Jewish state. As already noted, the only time these powers sought to territorially limit the Jewish national home was when, in accordance with Article 25 of the Mandate for Palestine, they separated the East Bank of the Jordan from it in 1922, which years later became the Hashemite Kingdom of Jordan. The rest of Palestine remained the area designated by both the Balfour Declaration and the League of Nations Mandate for the re-establishment of a Jewish homeland.

Therefore, to retroactively revise its political status, and reinvent the area as an already existing Arab state or as a precursor to a would-be Arab state of Palestine, would be tantamount to wiping out the historical and legal roots of the State of Israel and the internationally recognized rights of the Jewish people to a homeland in Palestine.

Currently, there is a disturbing trend in several international bodies to challenge the very legitimacy of the State of Israel, ignoring the extensive diplomatic history that supported the historical rights of the Jewish people to a nation-state of their own. This trend perhaps began in 1975 when the UN General Assembly adopted a resolution characterizing Zionism as a form of racism (a disgraceful position from which it subsequently retreated in 1991).⁴⁶ Some see this trend gaining ground with the infamous UN-sponsored World Conference against Racism held during 2001 in Durban, South Africa.

Regardless of its source, a legal determination linking the current efforts of the Palestinian Authority to be recognized as a state, for any purpose, with the original Mandate for Palestine would serve the interests of those who seek to delegitimize the State of Israel by erasing the fact that the international community envisioned the mandate to evolve into a Jewish state. Despite this legal history, Israel has repeatedly offered to make territorial compromises for the sake of peace. But it cannot accept any effort to compromise the legitimacy of its fundamental rights and the historical basis for its establishment as a Jewish national homeland.

2. Questioning the Argument that Palestinian Statehood Emanated from the 1988 Algiers Declaration of Statehood by Yasser Arafat

At a meeting of the Palestine National Council (PNC)⁴⁷ in Algiers on November 15, 1988, Yasser Arafat issued a Palestinian Declaration of Independence: "In exercise by the Palestinian Arab people of its rights to self-determination, political independence and sovereignty over its territory, the Palestine National Council, in the name of God, and in the name of the Palestinian Arab people, hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Jerusalem."

The declaration did not stipulate the territorial boundaries of this state. It made reference to UN General Assembly Resolution 181 from 1947, also known as the "Partition Plan" (which was never in fact implemented due to its outright rejection by Arab states and peoples), stating: "It is that Resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty." It also described the State of Palestine as being the state of the Palestinians "wherever they may be." This last point might suggest that the PLO wanted jurisdiction over Palestinian populations in already existing states, especially Israel and Jordan, creating significant conflicts with these two countries. It should not be surprising that many states refused to recognize that the declaration had any legal significance. Even Moscow, which was a close ally of the PLO during the Cold War, was only prepared to say, "the Soviet Union recognizes the *declaration* of the Palestinian state, but not the state itself" (emphasis added).⁴⁸

In the wake of the Algiers declaration of Palestinian statehood, the UN General Assembly adopted Resolution 43/177 on December 15, 1988, which “acknowledged the proclamation of the State of Palestine by the Palestine National Council” and then authorized that from then on, the PLO Observer Mission should be called “Palestine.”

The fact that this change in the nomenclature of the PLO Mission to the UN was recognized by 104 states has been argued by some to mean that Palestine was regarded as a state by a majority of the international community back in 1988.⁴⁹ However, a careful examination of the language of the 1988 UN General Assembly resolution suggests a very different conclusion.

True, the resolution states that it “acknowledges” the PNC’s proclamation, and in practical terms the resolution adds that: “the designation ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organization’ in the United Nations system.” But this change in nomenclature is followed by a critical clause that this step should be undertaken “without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system.” In other words, the resolution admitted that this was essentially a symbolic move, since the actual powers of the PLO Mission remained unchanged.

In practice, in the years that followed, the PLO Observer Mission continued to sit in the UN General Assembly alongside the other UN observer missions, including the Arab League and the Islamic Conference, and not with the member states of the UN. Indeed, the PLO Observer Mission itself acknowledges that while it enjoys a “unique and unprecedented” status at the UN, “somewhere in between the other observers, on the one hand, and the member states, on the other,” it is not a member state.⁵⁰

There is yet another aspect of the 1988 declaration of statehood by the PLO that raises serious questions as to its exact legal implications: how can it be argued that the 1988 declaration created a Palestinian state if the Palestinian leadership continued to threaten that it was going to unilaterally declare a state in 1999 and then again in 2009?

On the first occasion, Palestinian Authority leaders noted that the PA had been created as a five-year interim arrangement on May 4, 1994. They proposed that with the end of this transition period on May 4, 1999, it was necessary for the PA to declare a state. For example, Ahmed Qurei (Abu Ala), who then served as Speaker of the Palestinian parliament, wrote in the official Palestinian Authority newspaper *al-Hayat al-Jadida* on December 21, 1998: “On May 4, 1999, a political, legal and administrative vacuum will be created in the territories, and it will then be incumbent upon the Palestinian Authority and its institutions to declare the Palestinian state, which will fill this vacuum.”⁵¹

This was a false argument, for the Oslo implementation agreements did not stipulate that the Oslo Accords would expire after five years. While they expressly envisaged a target date of five years to complete the negotiations for a permanent status agreement, they did not provide that if the two sides were unable to conclude these negotiations by May 4, 1999, then the interim arrangements would simply terminate. Moreover, in practice, when the two sides had been unable to reach agreements according to specified target dates, the arrangement that had been in force continued to apply.⁵²

Ultimately, the PA failed to realize its threats to unilaterally declare statehood in 1999, but the campaign it waged nonetheless indicated that whatever action the PLO took in 1988 with regard to declaring a State of Palestine, it was not sufficient to fill the “legal vacuum” that the PA’s spokesmen asserted would emerge should the interim period under the Oslo Agreements come to an end.

A second occasion on which the Palestinian leadership threatened to unilaterally declare a Palestinian state was after the Albanian majority government in Kosovo seceded from Serbia in February 2008 and declared it was forming an independent state.⁵³ Yasser Abd Rabbo, a senior advisor to PA President Mahmoud Abbas, said in 2009: “Our people have the right to proclaim independence even before Kosovo. And we ask for the backing of the United States and the European Union for our independence.”⁵⁴ In a new variation to the unilateral Palestinian declaration, but still invoking the Kosovo example, chief Palestinian negotiator Saeb Erekat said in mid-November 2009 that “it is time [for the Security Council] to recognize a Palestinian state on the borders of 4 June 1967 with Jerusalem as its capital.”⁵⁵

Simultaneously, in November 2009, Muhammad Dahlan, the former Gaza security chief and senior Fatah leader, provided a more detailed version of this idea. In the Palestinian newspaper *al-Ayyam*, Dahlan stated that the PA was considering “unilaterally” declaring a state and then approaching the UN Security Council to define the borders of the Palestinian state as the 1967 lines, as well as to acknowledge that its capital will be East Jerusalem.⁵⁶ A third Fatah leader, Nabil Shaath, who had previously been active in negotiations on behalf of the PLO, explained that Mahmoud Abbas was leading a delegation to South America in order to seek endorsements from these countries that would lead to recognition of a Palestinian state.⁵⁷

Abbas himself held a joint press conference with President Hosni Mubarak of Egypt in November 2009 in which he confirmed that the PA was committed to approaching the UN Security Council and requesting a resolution recognizing a Palestinian state on the 1967 lines. Of course, the role of the UN Security Council when new states emerge is to be a part of the process that leads to their acquisition of UN membership. Presumably, Abbas was not just seeking a UN Security Council resolution alone, but hoped such multilateral action would lead to dozens of states recognizing the Palestinian state on a bilateral basis.

Again, this entire effort would be superfluous if the recognition granted in 1988 of the declaration of Palestinian statehood was sufficient. Prof. James Crawford of Cambridge also appeared to be baffled by this Palestinian unilateralism and it raised a serious question for him regarding the 1988 declaration: “If a new unilateral declaration is thought to be necessary by some within the PLO, on what basis was that of 1988 insufficient?”⁵⁸ Apparently, the Palestinian leadership did not feel that, whatever its symbolic value, the 1988 declaration had legally created a state, the emergence of which now requires multilateral action by the UN and bilateral recognition by its member states.

Finally, it was noteworthy that in 2004, when the UN General Assembly sought an advisory opinion from the ICJ on the legality of Israel’s security fence, the Palestinians were actually represented by a number of noted jurists, including Prof. Crawford, who rejected the critique that this was a contentious issue that should only be brought before the ICJ with the consent

of both parties, including Israel, like any other bilateral dispute between two states. By implication, and in line with his express and recorded position on the matter, his argument was based on the idea that a Palestinian state did not exist.⁵⁹ Even the Palestinians themselves spoke in their submission of a “*future* Palestinian state” (emphasis added).⁶⁰ All these actions raise serious questions as to whether the Palestinian leadership, which relied on this line of argument before the ICJ, believed it had actually declared a state in 1988, or only expressed a policy goal.

The ICJ itself confirmed the matter. It both specifically referred to the need for a negotiated solution in order to resolve outstanding issues and achieve “the establishment of a Palestinian state,” and also rejected Israel’s argument that its construction of a security fence to halt suicide-bombing attacks from the West Bank was consistent with Article 51 of the UN Charter on the grounds that Article 51 could only be applied in “the case of armed attack by one State against another State.”⁶¹ This restrictive view of the right of self-defense came under considerable criticism, especially in a post-9/11 security environment; it nevertheless showed that the ICJ itself did not consider that a Palestinian state already existed.



The Palestine Liberation Organization’s (PLO) National Council (PNC) adopted the Palestinian Declaration of Independence in Algiers on 15 November 1988.

3. *Challenging the Palestinian Claim to Uncontested Territorial Jurisdiction*

The Palestinian Authority's 2009 declaration expressed the PA's readiness to recognize the jurisdiction of the ICC over "the territory of Palestine." The declaration did not, however, specify the area that purportedly constitutes the "territory of Palestine," and left this crucial phrase open to interpretation. Indeed, several possible interpretations can be attributed to the phrase.

Each of the possible interpretations, however, gives rise to serious diplomatic difficulties: involving, at worst, claims to internationally recognized sovereign territory, and, at best, drawing the ICC into a quagmire of historic territorial disputes for which it was surely not designed nor intended to resolve.

The broadest territorial definition of the area of jurisdiction being claimed would be the original territory of British Mandatory Palestine. But this would clearly mean that the PA would be making a declaration of jurisdiction with regard to territory that is recognized in the international community as already being under full Israeli sovereignty. This interpretation is therefore untenable.

If the PA is of the view that a Palestinian state already exists on the basis of the 1988 Algiers Declaration of the PNC, and the PA declaration was made on this basis, then similar problems would also arise. As discussed above, the 1988 declaration based itself on UN General Assembly Resolution 181 of November 29, 1947, also known as the Partition Plan, which recommended the partition of Mandatory Palestine into a Jewish state and an Arab state. The Palestinian leadership and the Arab states rejected and tried to overturn the UN resolution and its recommendation by force of arms in 1948. Nevertheless, despite this history, the Algiers Declaration states: "It is this resolution that still provides those conditions of international legitimacy that ensure the right of the Palestinian Arab people to sovereignty."

The idea that Resolution 181, and the borders proposed therein, is "the legal basis" for any Arab state in former British Mandatory Palestine was proposed by Abu Ala in *al-Hayat al-Jadida* on December 21, 1998, when he stated: "It should be emphasized that the [Palestinian] state has internationally recognized borders set in the [1947] partition resolution."⁶² It was also raised by the PLO observer, Nasser al-Kidwa, in an official letter to UN Secretary-General Kofi Annan on March 25, 1999.⁶³ In the letter, which dealt with Resolution 181, al-Kidwa expressed doubts over Israeli territorial rights in areas beyond the boundaries recommended by the UN General Assembly in 1947: "We believe that Israel must still explain to the international community the measures it took illegally to extend its laws and regulations to the territory it occupied in 1948, beyond the territory allocated to the Jewish state in Resolution 181 (II)."⁶⁴

While the principle behind Resolution 181 – the creation of a Jewish state and an Arab state – retains value, unfortunately for al-Kidwa, according to international legal authorities, the specific boundaries proposed in the resolution have no relevance.⁶⁵ It bears repeating that the Palestinian leadership and the Arab states not only rejected Resolution 181, but actively sought to overthrow it: contemporaneous with the British withdrawal from Palestine, the country was invaded by the armies of Egypt, Iraq, Jordan, Lebanon and Syria. This attack justified Israeli

defensive measures, including those beyond the boundaries proposed by the Partition Plan.⁶⁶ According to Lauterpacht, “at the moment when the Resolution [181] failed to be implemented, its description of specific boundaries ceased to be fully relevant.”⁶⁷

Moreover, the 1949 Armistice Agreements signed between Israel, Jordan, Egypt, Lebanon, and Syria brought an end to official hostilities between Israel and its neighbors and replaced the territorial boundaries proposed in Resolution 181, extending Israeli sovereignty beyond the proposed partition boundaries. Thus, even if one were to overlook the Arab rejection of Resolution 181 and rely upon the resolution as a basis for the 2009 PA declaration to the ICC (a new territorial point of reference for any Palestinian claim), then that would also involve land that is under internationally recognized Israeli sovereignty today.

Clearly, basing the Palestinian claim to statehood on the 1988 Algiers Declaration poses a serious dilemma in which the territorial extent of the Palestinian request reaches into the sovereign territory of Israel. This, too, therefore, appears untenable.

However, if the Palestinian declaration were only intended to apply to the territory of the West Bank and the Gaza Strip alone, the ICC would find itself dragged into serious territorial questions that are at the heart of the peace process and the bilateral negotiations between the parties. Since Israel expressed its willingness to live alongside a demilitarized Palestinian state, the Israeli-Palestinian conflict has become increasingly a territorial dispute in which the Palestinian side seeks to establish a viable, contiguous state, while Israel hopes that at the end of the day it will obtain defensible borders.

Israeli Claims in the West Bank

It would be incorrect to assert that there are no competing claims to sovereignty in the West Bank.⁶⁸ Legally, UN Security Council Resolution 242, adopted in November 1967, months after the 1967 Six-Day War, never called on Israel to withdraw from all the territories it captured, but rather proposed that “secure and recognized boundaries” replace the 1949 armistice lines from which Israel was attacked. These new boundaries need to be negotiated between Israel and its Arab neighbors.

Israel’s territorial claims to the West Bank and Gaza Strip are not solely security-based – they emanate from the circumstances of the Six-Day War, as well. Israel captured the Gaza Strip, West Bank, and east Jerusalem in July 1967 in a war of self-defense, while the territories’ previous occupiers, Egypt and the Hashemite Kingdom of Jordan, respectively, controlled these territories unlawfully as a result of a war of aggression in 1948 (when Egypt and Jordan invaded the nascent State of Israel, along with three other Arab armies). Stephen Schwebel noted this important distinction and its legal consequences in the *American Journal of International Law* in 1970, before he became president of the International Court of Justice: “Where the prior holder of territory had seized that territory unlawfully, the state which subsequently takes that territory in the lawful exercise of self-defense has, against that prior holder, better title.”⁶⁹

A similar view was expressed by Lauterpacht, who stated: “territorial change cannot properly take place as a result of the *unlawful* use of force. But to omit the word ‘unlawful’ is to change the substantive content of the rule and to turn an important safeguard of legal principle into

an aggressor's charter. For if force can never be used to effect lawful territorial change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct."⁷⁰ In short, the boundaries between Israel and a future Palestinian state are still very much in dispute.

Over the years, Israel has articulated its security interests in key strategic areas of the West Bank, in particular. The Jordan Valley has served as the forward line of defense for the Israel Defense Forces and, under Israeli control, weapons smuggling and infiltration from the east have been prevented. The peaks of the West Bank hill ridge also contain early-warning stations that Israel would seek to retain. In past negotiations, Israel has sought to maintain control of the airspace over the West Bank in order to retain sufficient warning time to intercept potentially hostile aircraft from other states in the region. The fate of Israeli military positions in the West Bank will inevitably come up in any peace negotiations, where Palestinian claims to these territories will be met with Israeli claims, as well. And while Israel fully withdrew unilaterally from the Gaza Strip in September 2005, it still controls the area's airspace and territorial waters, both of which will arise as issues to be addressed in future security negotiations.

Thus, it would be an error to conclude that the entire territory of the West Bank and Gaza Strip will inevitably come under Palestinian sovereignty, so that the "territory of Palestine" can already be anticipated for purposes of ICC jurisdiction. The issue has become more complicated with Israeli proposals, from some quarters, that Israel compensate the Palestinian side through land swaps, according to which Israel would cede some of its own territory in exchange for West Bank territory that it might seek to annex. And as already noted, there are security issues that still must be resolved in relation to the Gaza Strip that have implications for the shape of a future Palestinian state. In any case, it would be premature to establish at present what might be the territorial contours of a Palestinian state in advance of a permanent status agreement between the parties.

Diplomatic Considerations

The above historical survey highlights a number of serious diplomatic implications that would result from an ICC decision to accept the PA declaration. First, after surveying the legal commitments undertaken by the PLO in the 1995 Interim Agreement, it becomes immediately apparent that the PA's attempt to involve the ICC in its conflict with Israel violates the agreement in a number of core areas. This is an international agreement that is still in force today and, though critics have questioned its continued validity, neither Israel nor the PLO has renounced it.

Thus, the first consequence of the PA's declaration being accepted by the ICC would be a significant erosion of the Oslo Agreements that have governed Israeli-Palestinian relations since 1993. As previously noted, three core elements of the agreement would be affected: the prohibition against the PA's conducting foreign policy, the obligation both parties undertook to resolve their differences through negotiations and not through unilateral acts, and the understandings the parties had reached regarding criminal jurisdiction. If a signed undertaking in these important areas is violated, then many of the other remaining elements in the Interim Agreement might also come to be discarded.

Second, any breakdown of the Interim Agreement would accelerate a disturbing trend that has been evident over the last decade or more: the Palestinians' interest in unilateralism over negotiations as the preferred mechanism for resolving their political differences with Israel. By supporting the Oslo Agreements, the international community has continually preferred that a resolution of the Arab-Israel conflict will come about through a negotiated settlement rather than by any other means. It is also a fact that throughout this period, states supporting the peace process have discouraged the PA from taking steps such as unilaterally declaring a Palestinian state.

The PA's declaration recognizing the jurisdiction of the ICC invokes Article 12 (3) and in so doing bases itself on an article in the ICC statute reserved for states. Indeed, the statute makes clear that only states can accept ICC jurisdiction under Article 12 (3).⁷¹ Thus, if the ICC accepts the PA's declaration, and in so doing grants recognition that in effect treats the PA as a state, it would be contributing to unilateralist sentiment on the Palestinian side. Such action would undermine the fragile negotiating process that Israel and other interested international parties are trying to advance.

Negotiations over such difficult issues as borders, the status of Jerusalem, and the fate of refugees inevitably can become stalled and undergo repeated crises. They might also break down completely from time to time. Inserting the issue of ICC jurisdiction into the present environment in Israeli-Palestinian negotiations is likely to fortify Palestinian intransigence at the peace table, since PA negotiators will feel that they can fall back on unilateralist options instead of compromising in order to reach an agreement.

There is also a fundamental issue of principle. Should the Palestinians move in the direction of unilateralism, as noted earlier, they will be violating core commitments that appeared in their past agreements with Israel. In short, it would be an illegal act. Highly politicized international bodies might not be concerned with taking steps that could encourage the violation of bilateral agreements. However, a more principled approach would seek to stay clear of any diplomatic initiatives which could promote an act of this sort. For this reason, states are not supposed to recognize an entity that has declared statehood unlawfully.

By analogy, international institutions like the ICC should also seek to stay clear of contentious political questions, such as whether the PA qualifies as a state government, which are completely premature and conflict with the substance of past signed agreements.⁷² Professor George P. Fletcher of Columbia Law School has aptly warned in this regard: "It is not the role of the ICC to involve itself in political issues or to truncate that international and bilateral process through a unilateral ascription of statehood, whether direct or implied, countering delicate agreements and on-going international effort in this matter."⁷³ He also sees involvement in this issue having negative implications for the ICC's reputation. "It would be most unfortunate if a general perception of politicization of the Court's handling of the Article 12 (3) declaration of the Palestinian Authority were to take hold."⁷⁴

The likely diplomatic consequences in the Middle East itself of the adoption of a unilateralist option by the Palestinians have been previously considered. On November 11, 1998, when the Israeli government accepted the Wye River Memorandum, but simultaneously became aware of Palestinian statements regarding opting for unilateralism in the future, it issued the following statement: "A unilateral declaration by the Palestinian Authority on the establishment

of a Palestinian state, prior to the achievement of a Final Status Agreement, would constitute a substantive and fundamental violation of the Interim Agreement. In the event of such a violation, the government would consider itself entitled to take all necessary steps, including the application of Israeli rule, law and administration to settlement areas and security areas in Judea, Samaria, and Gaza, as it sees fit."⁷⁵

The Israeli statement raises the possibility that Palestinian unilateralism could result in Israeli unilateralism. It has already been noted that in parts of these territories, Israel has vital security interests, which it cannot afford to forfeit as a result of a Palestinian unilateralist move. Whether the Israeli statement was an actual political program in 1998 or only a form of diplomatic deterrence cannot be determined, but it does indicate that should the Palestinians be urged to move in a unilateral direction, Israel cannot be expected to stand still and, as a result, the overall stability of the Middle East region may well be affected.

Any action which promotes Palestinian unilateralism is particularly explosive precisely because it is very difficult to delineate at this point where the future borders of a Palestinian state may be situated. From the previous analysis it becomes clear that Palestinian political leaders have spoken about very different boundaries for defining a Palestinian state. Would the Palestinian claim be to the 1967 lines, known formally as the 1949 Armistice lines? UN Security Council Resolution 242, as previously noted, was adopted in 1967, after the Six-Day War, but did not explicitly call on Israel to withdraw to the pre-war lines. Palestinian spokesmen have also made reference to the 1947 lines appearing in UN General Assembly Resolution 181. The potential for overlapping territorial claims will be considerable should the PA decide on a more unilateralist course rather than on a path of negotiations.

To conclude, the question of whether the ICC accepts the PA declaration of jurisdiction cannot be viewed in a vacuum. The international community has supported a peace process which at times looks promising while at other moments seems to be precarious. In the past, the PLO sought to adopt symbolic steps to promote its goal of achieving Palestinian statehood, even though it was not entirely clear to what extent its actions were rooted in careful legal considerations. Now the PA appears to have chosen a similar course of action by which it seeks to be recognized as a state by the ICC, without expressly declaring itself to be so, by basing itself on a clause in the ICC statute reserved only for state actors. The place where Palestinian interests should be addressed and realized is at the negotiating table, not the ICC.

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- * This study is based on a submission to the Office of the Prosecutor of the International Criminal Court in The Hague, Netherlands, on October 20, 2010, entitled: **“Discussion on Whether the Declaration Lodged by the Palestinian Authority Meets Statutory Requirements: Historical and Diplomatic Considerations.”** It does not represent the views of any branch of the Government of Israel.
- 1 Palestinian National Authority, Ministry of Justice, Office of the Minister, “Declaration Recognizing the Jurisdiction of the International Criminal Court,” signed in The Hague, Netherlands, January 21, 2009.
 - 2 See, in particular, Opinion of Professor Malcolm Shaw, submitted to the OTP by the International Association of Jewish Lawyers and Jurists, September 9, 2009; Submission of the European Centre for Law and Justice, submitted to the OTP, September 9, 2009, and Opinion of David Davenport, Kenneth Anderson, Samuel Estreicher, Eugene Kontorovich, Julian G. Ku, and Abraham D. Sofaer, submitted to the OTP, November 19, 2009.
 - 3 James. R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), p. 421.
 - 4 “First Circuit Rejects Sovereign Immunity Claim by Palestinian Authority,” 99 *American Journal of International Law*, 696 July 2005.
 - 5 *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion, 2004 ICJ Reports 136, paragraph 139.
 - 6 *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, Washington, DC, September 28, 1995 (Jerusalem: Ministry of Foreign Affairs).
 - 7 While the agreements refer to a Palestinian Council and an Executive Authority of the Council, including a *Ra’ees* (Arabic, for President or Chairman), these are commonly referred to as the “Palestinian Authority” (or by the Palestinians as the “Palestinian National Authority”).
 - 8 Additionally, the principle that “[t]he withdrawal of the military government shall not prevent it [Israel] from exercising the powers and responsibilities not transferred to the Council” is entrenched in Article I, 5.
 - 9 *Ibid.*
 - 10 See Articles III, 6; XVII; and the relevant provisions of Annex IV.
 - 11 Article XXXI.
 - 12 Alan Baker, “A Paradox of Peacemaking: How Fayyad’s Unilateral Statehood Plan Undermines the Legal Foundations of Israeli-Palestinian Diplomacy,” *Jerusalem Viewpoints*, No. 574, November-December 2009, Jerusalem Center for Public Affairs, http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=2&DBID=1&LNGID=1&TMID=111&FID=443&PID=0&IID=3185&TTL=A_Paradox_of_Peacemaking:_How_Fayyad’s_Unilateral_Statehood_Plan_Undermines_the_Legal_Foundations_of_Israeli-Palestinian_Diplomacy.
 - 13 Prof. Malcolm Shaw QC, “In the Matter of the Jurisdiction of the International Criminal Court with regard to the Declaration of the Palestinian Authority: Opinion,” as submitted to the Prosecutor of the International Criminal Court in The Hague by the International Association of Jewish Lawyers and Jurists, Alex Hertman, Adv., President, September 9, 2009.
 - 14 Tal Becker, *International Recognition of Unilaterally Declared Palestinian State* (Jerusalem: Jerusalem Center for Public Affairs, 2000), p. 17.
 - 15 John Quigley, “The Palestine Declaration to the International Criminal Court: The Statehood Issue,” *Rutgers Law Record*, Volume 39, Spring 2009. See also, “Al-Haq Position Paper on Issues Arising from the Palestinian Authority’s Submission of a Declaration to the Prosecutor of the International Criminal Court under Article 12(3) of the Rome Statute,” Al-Haq, December 14, 2009, [http://www.alhaq.org/pdfs/position-paper-icc-\(14December2009\).pdf](http://www.alhaq.org/pdfs/position-paper-icc-(14December2009).pdf). Quigley relies on the analysis of Henry Cattan, who represented the Arab Higher Committee, and Fouad Ammoun, a judge on the International Court of Justice who wrote about mandates, in general, and not the Mandate for Palestine in particular. See John Quigley, *The Statehood*

of Palestine: *International Law in the Middle East Conflict* (Cambridge: Cambridge University Press, 2010), pp. 69-70. If an argument is to be advanced that a national group had sovereignty in British Mandatory Palestine, it would make more sense to speak about the rights of the Jewish people since the Mandate only related to their national homeland, and did not speak about the "national" rights of any other group. See Howard Grief, *The Legal Foundation of Borders of Israel under International Law* (Jerusalem: Mazo Publisher, 2008), p. 71.

- 16 UN General Assembly Resolution 181, November 29, 1947.
- 17 Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals ("Sala de lo Penal de la Audiencia Nacional"), regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. See also Appeal of the Coordinating Prosecutor (Pedro Martinez Torrijos), 6 May 2009, from the Order of the Audiencia Nacional de Madrid, 4 May 2009, in Preliminary Proceedings Case no. 157/2008 (emphasizing that Israel's investigatory system, with review by Military Advocate General, Attorney General, and Supreme Court, "fully satisfy" the requirements of "an independent and impartial system of justice").
- 18 J.C. Hurewitz, *The Struggle for Palestine* (New York: Schocken Books, 1950), p. 17. J. Stone, "Israel, the United Nations, and International Law: Memorandum of Law, June, 1980," *The Arab-Israel Conflict, Volume IV: The Difficult Search for Peace (1975-1988), Part One*, edited by John Norton Moore (Princeton, NJ: Princeton University Press, 1991), p. 800.
- 19 Muhammad Y. Muslih, *The Origins of Palestinian Nationalism*, Institute for Palestine Studies Series (New York: Columbia University Press), p. 11.
- 20 Rashid Khalidi, *Palestinian Identity: The Construction of Modern National Consciousness* (New York: Columbia University Press, 2009), p. 163. "Many in Palestine and elsewhere were motivated by the hope that all of Syria (here meaning greater Syria, or *Bilad al-Sham*, including the modern-day countries of Syria, Lebanon, Jordan and Palestine/Israel) would remain united under the state established by Amir Faisal, the third son of Sharif Husayn, as a first stage toward a larger Arab unity, a hope that was to wane in succeeding years, although it remained alive."
- 21 For example, the Arab Higher Committee (AHC), headed by Hajj Amin al-Husseini, asked in 1958 "for the joining of Filastin, within its natural borders as being the Southern part of Syria" to the United Arab Republic. Moshe Shemesh, *The Palestinian Entity 1959-1974: Arab Politics and the PLO* (London: Frank Cass, 1996), p. 28. Daoud Kuttab has also noted, "Because Palestinians looked to the Arab world for their salvation, Arab nationalism was still stronger than a more localized Palestinian form of nationalism." Kuttab explains that "this changed after 1967." See Daoud Kuttab, "Palestinian Nationalism," Common Ground News Service, September 23, 2009.
- 22 On November 2, 1917, the British Government issued a formal statement of policy, which came to be known as the Balfour Declaration. The Balfour Declaration states: "His Majesty's Government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object." Martin Gilbert, *Israel: A History* (London: Black Swan, 1998), p. 34.
- 23 William Foxwell Albright, *et al. Palestine: A Study of Jewish, Arab and British Policies*, Esco Foundation (New Haven: Yale University Press, 1947), Volume I, p. 143.
- 24 Nathan Feinberg, *Some Problems of the Palestine Mandate* (Tel Aviv: 1936), pp. 37-39.
- 25 See Peal Commission Report, 1937, <http://unispal.un.org/pdfs/Cmd5479.pdf>.
- 26 The Treaty of Sèvres was not ratified by the Ottoman Empire as a result of an internal national uprising. The succeeding state, the new Republic of Turkey, signed a new agreement, the Treaty of Lausanne, in 1923 re-confirming the surrender of all non-Turkish territories and the renunciation of Turkish rights with respect to them.
- 27 Hurewitz, p. 18. See also Allan Gerson, *Israel, the West Bank, and International Law* (London: Routledge, 1978), p. 43.

- 28 Hersch Lauterpacht, "The Mandate under International Law in the Covenant of the League of Nations," in E. Lauterpacht (ed.), *Hersch Lauterpacht: International Law, Collected Papers, Volume 3, The Law of Peace* (Cambridge: Cambridge University Press, 1977), p. 45.
- 29 Gerson, p. 43.
- 30 Lauterpacht, *op. cit.*
- 31 Benny Morris, *1948: The First Arab-Israeli War* (New Haven: Yale University Press, 2008), p. 10.
- 32 "Tentative Recommendations for President Wilson by the Intelligence Section of the American Delegation to the Peace Conference," January 21, 1919, in J.C. Hurewitz (ed.), *The Middle East and North Africa in World Politics: A Documentary Record, Vol. 2, British-French Supremacy, 1914-1945* (New Haven: Yale University Press, 1979), pp. 132-36.
- 33 Nathan Feinberg, "The Legal Status of the Jews at the Peace Conference," in Nathan Feinberg, *Some Problems of the Palestine Mandate*.
- 34 Albright, *et al.*, Volume One, p. 241.
- 35 *Ibid.*, p. 229.
- 36 *Ibid.* The historical record in fact shows Jewish resistance continued with major armed revolts in 115 against Trajan, 135 against Hadrian, 351 against Gallus, and 614, when the Jews joined the Persians to fight Roman rule. See S. Safarai, "The Era of the Mishnah and Talmud," in H.H. Ben-Sasson (ed.), *A History of the Jewish People* (Cambridge: Harvard University Press, 1976), pp. 330-363.
- 37 *The Mavrommatis Palestine Concessions (Greece v. Great Britain)*, 1 P.C.I.J. Reports 293, 1934.
- 38 Felix Frankfurter, "The Palestine Situation Restated," *Foreign Affairs*, 418, 1930-1931.
- 39 Treaty of Peace with Turkey Signed at Lausanne, July 24, 1923.
- 40 See, for example, Submission of John Quigley to the Office of the Prosecutor, International Criminal Court, March 23, 2009.
- 41 Lauterpacht, p. 68.
- 42 Arnold D. McNair, "Mandates," *Cambridge Law Journal*, Vol. III, No. 2.
- 43 Quincy Wright, "Sovereignty of the Mandates," *American Journal of International Law*, Vol. 17, No. 4, October 1923, p. 698.
- 44 *Ibid.*, pp. 698-703.
- 45 McNair, "Mandates."
- 46 See UN General Assembly Resolution 3379, November 10, 1975, and UN General Assembly Resolution 46/86, December 16, 1991.
- 47 The PNC is the largest decision-making body within the PLO.
- 48 James L. Prince, "The International Legal Implications of the November 1988 Palestinian Declaration of Statehood," *Stanford Journal of International Law*, 681, 1988-1989, p. 704.
- 49 See Quigley, *Rutgers Law Record*, *op. cit.*
- 50 <http://www.un.int/palestine/status.shtml>.
- 51 "Resolution 181 Chronology: Statements in the Palestinian Media," *MEMRI Special Report No. 3*, May 13, 1999.
- 52 Document 15, Letter from Israel's Ambassador to the United Nations, Dore Gold, to UN Secretary-General Kofi Annan on the Palestinians' Intention to Proclaim a Palestinian State on 4 May 1999. April 19, 1999, State of Israel, Ministry of Foreign Affairs, *Yearbook of Official Documents* (Jerusalem, 2002), p. 78.
- 53 Dan Diker, "The Palestinians' Unilateral 'Kosovo Strategy': Implications for the PA and Israel," *Jerusalem Viewpoints* No. 575, January-February 2010, Jerusalem Center for Public Affairs.
- 54 *Ibid.*

- 55 International Crisis Group, "Tipping Point? Palestinians and the Search for a New Strategy," *Middle East Report*, No. 95, 26 April 2010, p. 18.
- 56 *Ibid.*
- 57 *Ibid.*
- 58 Crawford, p. 446.
- 59 Yael Ronen, "ICC Jurisdiction Over Acts Committed in the Gaza Strip: Article 12 (3) of the ICC Statute and Non-State Entities," *International Journal of Criminal Justice*, Vol. 7(1), 2009.
- 60 *Ibid.*
- 61 *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion, 2004 ICJ Reports 136, paragraph 139.
- 62 MEMRI, *op. cit.*
- 63 UN General Assembly, Security Council, A/53/879, S/1999/334, 25 March 1999, "Letter dated 25 March 1999 from the Permanent Observer of Palestine to the United Nations addressed to the Secretary-General."
- 64 *Ibid.*
- 65 Elihu Lauterpacht, "Jerusalem and the Holy Places," The Anglo-Israel Association, Pamphlet No. 19 (1968), p. 21.
- 66 Stephen Schwebel, "What Weight to Conquest," 64 *American Journal of International Law*, 1970, p. 346.
- 67 Lauterpacht, "Jerusalem and the Holy Places," p. 21.
- 68 Israel withdrew from all of the Gaza Strip in September 2005 as part of the Disengagement Plan.
- 69 Schwebel, "What Weight to Conquest," p. 346.
- 70 Lauterpacht, "Jerusalem and the Holy Places," p. 52.
- 71 George P. Fletcher, "No Jurisdictional Basis for an Investigation Pursuant to the Palestinian Declaration," Human Rights International Criminal Law Online Forum, UCLA.
- 72 Tal Becker, p. 17.
- 73 Fletcher, *op. cit.*
- 74 *Ibid.*
- 75 Quoted by Crawford, p. 445.

Declaration Recognizing the Jurisdiction of the Criminal Court

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

Palestinian National Authority
Ministry of Justice
Office of Minister



السلطة الوطنية الفلسطينية
وزارة العدل
مكتب الوزير

Date: -----

التاريخ: -----

Ref: -----

الرقم: -----

Declaration recognizing the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Material supplementary to and supporting this declaration will be provided shortly in a separate communication.

Signed in The Hague, the Netherlands, 21 January 2009

For the Government of Palestine

Minister of Justice

Ali Khashan

Ramallah ,Almasyon
Tel: 022973263,022973265
Fax: 022973264

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INTERNATIONAL CRIMINAL COURT OPENS INQUIRY INTO POSSIBLE WAR CRIMES IN PALESTINIAN TERRITORIES

Amb. Alan Baker

As we have said repeatedly, we do not believe that Palestine is a state, and therefore we do not believe that it is eligible to join the ICC.

— State Department spokesman Jeff Rathke, January 16, 2015.

A Response to UN Secretary General Ban Ki-moon

18 January 2015

H.E. Ban Ki Moon, Secretary General of the United Nations,
United Nations Headquarters,
405 East 42nd Street,
New York, NY 10017

Mr. Miguel de Serpa Soares, UN Under-Secretary General for Legal Affairs,
United Nations Headquarters
New York, NY 10017

Mr. Stephen Mathias, UN Assistant Secretary General for Legal Affairs,
United Nations Headquarters, Room S-3624,
New York, NY 10017

Mr. Santiago Villalpando, UN Acting Chief, Treaty Section,
United Nations Headquarters, Room DC2-0520,
New York, NY 10017

Mrs. Fatou Bensouda, ICC Prosecutor,
International Criminal Court (ICC),
P.O.B. 19519, 2500 CM,
Maanweg 174, 2516 AB Den Haag,
Netherlands

Excellencies,

I write this letter as a former Legal Officer in the UN Office of Legal Affairs, a former senior member of Israel's delegation to the 1998 Rome Conference on the ICC and to the preparatory committee involved in the drafting of the ICC Statute, as former Legal Counsel of the foreign ministry of Israel, a regular participant in the General Assembly's 6th (Legal) Committee and as the former ambassador of Israel to Canada.

In the above capacities, I have been intimately involved both in the extensive legal activity within and for the UN, as well as throughout the various stages in the development and drafting of the ICC Statute and other international legal instruments.

As such, clearly, both the UN and the ICC remain dear to me and close to my heart.

As you are probably aware, the concept of the creation of an independent, permanent International Criminal Court was born following the atrocities of the Second World War and the Holocaust, and representatives of the world's Jewish communities and the State of Israel were actively involved, since the early 1950's, in developing the vision and bringing it to fruition. In this capacity, I had the honor to accompany the late Prof. Shabtai Rosenne and the late Judge Ely Nathan and other prominent Israeli international lawyers in the various stages of the negotiation and drafting of the Statute.

However, despite active Jewish and Israeli involvement in the concept and drafting of the Statute, Israel was prevented from becoming party to it, *inter alia* in view of the injection of politicization into the drafting of the list of crimes set out in Article 8 of the Statute, and specifically the politically motivated manipulation of the drafting of sub-paragraph (b)viii.¹

To our great regret, as a "founding father" of the vision, it became evident to Israel that in contravention of the very ideal of an independent juridical institution, the Statute, from the start, was given to politicization, a factor which did not auger well for the future successful functioning of the Court.

Regrettably, our worst fears have recently come to fruition, and the ICC is rapidly and unjustifiably, – and doubtless against its own better interests – being manipulated to become a politicized "Israel-bashing" body, at the initiative of the Palestinian leadership which wrongfully perceives, and widely represents the Court as being their own private judicial tribunal, in order to conduct their political campaign against Israel.

This is borne out in several recent instances in which both the Secretary General and the ICC Prosecutor have been petitioned by the Palestinians to make political determinations at variance with the aims, purposes and very provisions of the Statute.

I refer specifically to the recent Depositary Notifications issued by the Secretary General, Reference C.N.13.2015.TREATIES-XVIII.10 and 13, both dated 6 January 2015, issued following documents transmitted by the Palestinian leadership to the Secretary General on 2 January 2015, requesting accession to the Rome Statute, and other treaties.

These Depositary Notifications acknowledged that:

The [ICC] Statute will enter into force for the State of Palestine on 1 April 2015 in accordance with its article 126(2)

and

The Agreement [on the Privileges and Immunities of the ICC] will enter into force for the State of Palestine on 1 February 2015 in accordance with its article 35(2).

These notifications cite the respective articles in both documents, which refer to “each State ratifying, accepting or acceding to this [Statute][Agreement].”

With respect, it would appear that in so issuing the above depositary notifications, the Secretary General has acted *ultra vires* a number of essential and well-established requirements concerning the functions of a depositary:

- » Article 76(2) of the Vienna Convention on the Law of Treaties, 1969² according to which:

The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter’s function shall not affect that obligation.

- » Article 77(1)(d) of the Vienna Convention, regarding the functions of the depositary, which requires:

examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question.

- » Article 77(2):

In the event of any difference appearing between a State and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of the signatory States and the contracting States, or where appropriate, of the competent organ of the international organization concerned.

- » The 1999 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev 1)³, prepared by the Treaty Section of the Office of Legal Affairs, analyses, on the basis of practice, those situations in which the Secretary General must ascertain whether a State or an organization may become a party to a treaty deposited with him. (Chapter V, Paragraph 73)

Such practice addresses various formulae for issuing depositary notifications in situations where a treaty is open to “all States” (as is the case of the ICC Statute), but where the applicant

is not a member of the UN or party to the International Court of Justice. In such situation, paragraph 79 addresses the situation where:

...a difficulty has occurred as to possible participation in treaties when entities which appeared otherwise to be States could not be admitted to the United Nations, nor become parties to the Statute of the International Court of Justice owing to opposition, for political reasons of a permanent member of the Security Council.

The document goes on to state, in Section 80:

...the Secretary General has on a number of occasions stated that there are certain areas in the world whose status is not clear. If he were to receive an instrument of accession from any such area, he would be in a position of considerable difficulty unless the Assembly gave him explicit directives on the areas coming within the "any State" or "all States" formula. He would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas, whose status was unclear, were States. Such a determination, he believed, would fall outside his competence.

He therefore stated that when the "any State" or "all States" formula was adopted, he would be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula....

This practice of the Secretary General became fully established and was clearly set out in the understanding adopted by the General Assembly without objection at its 2202nd plenary meeting, on 14 December 1973, whereby

the Secretary-General, in discharging his functions as a depositary of a convention with an "all States" clause, and whenever advisable, will request the opinion of the Assembly before receiving a signature or an instrument of ratification or accession.

Clearly, in light of the above, the "all States" formula as it appears in articles 125 and 126(2) of the ICC Statute, is intended to refer solely to established States and not to entities which, while claiming to be states, are not sovereign entities.

In this context, 2012 General Assembly resolution 67/90 which upgraded the Palestinian status within the UN to that of a "non-member observer state"⁴ and which is being cited by the Palestinian leadership as the authority for its requests for acceptance by the court, cannot be considered, by any legal interpretation or analysis, as indicative of, or granting statehood, nor as a legitimate source of guidance to the Secretary General in determining whether the Palestinian request for accession is "in due and proper form" as required by Article 77 of the Vienna Convention on the Law of Treaties.

That resolution did nothing more than to reaffirm in recommendatory form "the right of the Palestinian people to self-determination and to independence in their State of Palestine" and recommended that the various organs within the United Nations system "continue to support

and assist the Palestinian people in the early realization of their right to self-determination, independence and freedom.”

That resolution did not establish or acknowledge Palestinian statehood or sovereignty as such, and did nothing more than to call for

the attainment of a peaceful settlement in the Middle East that ends the occupation that began in 1967 and fulfils the vision of two States: an independent, sovereign, democratic, contiguous and viable State of Palestine living side by side in peace and security with Israel on the basis of the pre-1967 borders.

The peace negotiation process and peaceful settlement envisaged was indeed referred to in the preamble to this resolution and is ongoing.

Clearly this resolution did not create a state of Palestine. A political General Assembly cannot and should not serve to guide the ICC Prosecutor in carrying out her legal functions. Clearly, the General Assembly is not a judicial body, but a political one. Its determinations are political, not legal.

By the same logic, the ICC Prosecutor’s most recent announcement, dated January 17, 2015, of her intention to open a “preliminary examination into the situation in Palestine” following a Palestinian declaration of acceptance of the court’s jurisdiction under article 12(3) of the ICC Statute, would appear to be similarly *ultra vires*. This in light of her determination that the Palestinian Authority is a state based solely on her reading of the above-noted General Assembly Palestinian upgrade resolution 67/90 which, as stated above, represents nothing more than the political position of the states voting in favor of it.

In view of the above, and taking into consideration the accepted international criteria for statehood as set out in the 1933 Montevideo Convention⁵ which include among other things, a unified territorial unit and responsible governance of its people, and capability of fulfilling international commitments and responsibilities, no serious UN organ or the Prosecutor of the ICC could, logically accept the Palestinian authority’s claim to statehood and accession to the ICC Statute, as well as to other international conventions limited to “States” or to “all States.”

In light of the above, and with a view to protecting the integrity of the ICC and honoring the basic purposes and principles for which it was established, and in order to prevent any further damage, you are requested to review your recent determinations and to reject the attempts to politicize the ICC.

Respectfully,

Alan Baker, Ambassador (ret’), Attorney,
Director, Institute for Contemporary Affairs
Jerusalem Center for Public Affairs



Notes

1. http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf
2. http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf
3. https://treaties.un.org/doc/source/publications/practice/summary_english.pdf
4. A/Res/67/19, 26 November 2012, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/181C72112F4D0E0685257AC500515C6C>
5. Article 1, 1933 Montevideo Convention, <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>

POLITICIZING THE INTERNATIONAL CRIMINAL COURT

Prof. Eugene Kontorovich

Introduction

In a press conference recently, Mahmoud Abbas threatened to use Palestine's GA-recognized "state" status to challenge Israel's settlements in the International Criminal Court.¹ He picked a most unlikely venue for the presser – Ankara, in a joint conference with Turkey's president. The absurdity of this is that Turkey continues to occupy much of Cyprus, and is responsible for a massive settlement program there. Indeed, Turkish settlers now constitute an absolute majority in Northern Cyprus. Cyprus itself is already an ICC member, and thus any state party, or the prosecutor himself, can commence proceedings against Turkey, but none seem interested, and Ankara does not seem worried.

Israel, on the other hand, is quite alarmed, for the same reason the Turks are unperturbed. The threat of a war crimes suit at the ICC concerning (Israeli) settlements has nothing to do with the established role of the Court or any precedent in international criminal law. Rather, it is part of the Durban Strategy, adopted by the NGO Forum at the United Nations Conference on Racism in 2001.² The strategy seeks to use tools of lawfare to isolate and delegitimize Israel. This involves confronting Israel in international organizations, some of which have been almost entirely hijacked by anti-Israel forces. Turkey is a partner rather than a target in this expressly political enterprise, and thus has nothing to fear.

The International Criminal Court has become perhaps the most important weapon in the lawfare campaign against Israel, particularly for Palestinian diplomatic and political efforts. Israel's various antagonists have increasingly sought to channel what were otherwise diplomatic disputes with Israel into criminal proceedings. Since 2009, Palestinian officials have sought or threatened ICC action first into Israeli military operations in the Gaza Strip, and more recently, the existence of Jewish civilian communities (settlements) in the West Bank. Similarly, the Israeli interdiction of the flotilla running the Gaza blockade was first the object of extensive diplomacy with Turkey, and then was channeled into an ICC investigation.

It is difficult to overestimate the impact that a threat of an ICC investigation has on Israel, even though there are numerous jurisdictional barriers to such a proceeding. The ICC hangs over Israeli decision-making from the tactical to the strategic level. For example, in May 2012, the Israeli government forcibly removed Jewish residents from a house they had purchased in Hebron; the Attorney General had warned that if the members of the government allowed illegal property take-overs, they could find themselves prosecuted for violating the Geneva Convention.³ On a much larger scale, Prime Minister Netanyahu entered "final status"

negotiations with the Palestinians, and paid for the privilege with the high price of releasing convicted terrorist killers. The deal was that at least as long as Israel makes concessions, the Palestinians would put off seeking action at the ICC.⁴ If the talks do not go as the Palestinians like, they will “go to the ICC.”

Thus the price for the “suspension” of ICC action is Israel’s entire territorial and political demands. The ICC is supposed to be an instrument of justice, not a bargaining chip. But the Palestinian leadership has consistently used the ICC as a very explicit cudgel to demand concessions from Israel.⁵ In the Court’s jurisprudence as well as its Statute, justice takes precedence over diplomatic considerations such as peace negotiations. Ironically, a Court whose mission is to punish mass atrocity is being used as a tool for the mass *release* of convicted murders.

The Court was created to deal with, and deter, the gravest crimes in the world – genocide, ethnic cleansing, crimes against humanity, and other instances of mass atrocity. It has done little to prevent such outrages, or even punish them. Israel’s region alone features army massacres in Egypt, chemical warfare, ethnic cleansing and worse in Syria, genocide-inciting nuclear proliferators in Iran, and so forth. Yet the ICC is being used as a threat against the one country in the region not convulsed by violence or dominated by an authoritarian regime.

Since the 1990s, Israel has faced lawfare challenges from politically motivated prosecutions, or threatened prosecutions, of its leaders in foreign countries. The doctrine of “universal jurisdiction” for serious international law crimes allowed nations with no connection to the alleged offenses to arrest and try suspects. While this doctrine resulted in proceedings in Britain, Spain, and Belgium against Israeli leaders for alleged war crimes, these cases did not get far, largely because they lacked the support of the governments. Moreover, when such cases were brought against leaders of more powerful states, like the United States and China, the European nations promptly narrowed their statutes.

The International Criminal Court poses a greater problem for Israel because it is a court without a country. There is no foreign or prime minister to restrain politicized prosecutions, who might value an ongoing relationship with Israel, or who might fear a loss of trade, intelligence cooperation, and so forth. Moreover, European universal jurisdiction cases were reined in because they went too far, targeting not just Israel but also the United States. It is almost completely inconceivable that the ICC bureaucracy would take any steps against the United States or any other major power that had not consented to jurisdiction. Moreover, the ICC has been under pressure to pursue a “Western” nation, as all of its cases thus far have involved African atrocities.⁶ European states almost entirely avoid hostilities, the context in which deplorable war crimes might occur, and thus Israel may be an appealing “diversity” candidate for the Court.

Given the lack of ICC jurisdiction – and in Israel’s view, the lack of any underlying crimes – one must understand why Israel fears the Court so much. Certainly other countries do not appear to have been significantly harmed by an ICC investigation.⁷ Kenya’s top leaders have actually been indicted and are being tried in The Hague, but that has evidently not damaged the country’s diplomatic relations, and did not even keep one of the accused from being elected

president. Yet, for Israel, the threat of ICC proceedings is troubling because it is seen as being a cue or focal point for a new and more aggressive wave of delegitimization activity, much as the Goldstone Report was used. Nor does Israel wish to be the first and likely only Western democracy singled out at the bar of international justice. Thus the process is the punishment. As with the subsequently retracted Goldstone Report, the sensational nature of the ICC launching an investigation into Israel would overshadow any subsequent developments. Finally, Israel has seen other nominally neutral international bodies be hijacked by anti-Israel agendas. There is no evidence that this will be true of the ICC, but for Israel the risks of finding out are too high.

This chapter will explore how the efforts to enlist the ICC into a broader delegitimization campaign against Israel both flouts the international law rules that establish the Court, while threatening to politicize and trivialize the institution. Part 2 explains how incongruous proceedings against Israel would be within the context of the Court's role and function in the past decade. Part 3 explains the background of Palestinian machinations to bring claims against Israel to the ICC. Part 4 explains how even if Palestine is a state, and because Israel is not a state party, the ICC would have no jurisdiction over Israel settlements. Efforts to bring such a matter before it are an invitation to the Court to usurp authority and disregard its Statute. Part 5 considers the more recent and quixotic attempts to inject the Court into the Gaza Flotilla controversy.

The Extraordinary Nature of an ICC Role

The Palestinians glibly threaten to "take Israel to the ICC" over Jewish civilian communities; the United States, by counting abstention from such action as a Palestinian concession, flatters the legitimacy and realism of such threats. And the United Nations Human Rights Council has suggested the possibility of ICC jurisdiction over the settlements issue.⁸ Yet the Palestinian threat has nothing to do with how the ICC actually functions. Currently the Court clearly has no jurisdiction over any aspect of the Israeli-Palestinian conflict. Far from a routine or recognized course of action, it would be extraordinary and unique for the ICC to accept such referrals. It would be unprecedented along several dimensions.

For example, one does not just "go" to the ICC. In its short history, the ICC has only completed two trials, one resulting in an acquittal. It has only accepted eight situations, all of them involving mass murder, depredation and wholesale brutality.⁹ Only 18 defendants have been charged across the eight cases, with less than half of them in custody. Of the other defendants, one has since his indictment been elected president of Kenya, while another remains a globe-trotting head of state, despite ICC rules requiring all member nations to arrest him.

Moreover, despite popular conceptions, the ICC does not have jurisdiction over all international crimes in the world. Rather, it is a membership organization. Nations become parties to the Court by acceding to its Statute, which is an international treaty. The Court only has jurisdiction over crimes committed in the territory or by the nationals of countries that

have accepted its jurisdiction.¹⁰ Notably, prominent Western targets of lawfare, the United States and Israel, are not parties to the Statute. Nor are the nations in the world that account for most of its population, and most of the potential for ICC charges: neither China, nor India, nor Pakistan, nor Russia have joined the Court. In the Middle East, only post-Saddam Iraq has become party to the Court.

An ICC case about Israel's settlements would be an extraordinary combination of firsts. While a relatively new court will frequently break new ground, this case would pile innovation upon innovation for the sake of prosecuting Israeli officials.

- » The ICC has never accepted a referral by one state against another.
- » The ICC has never received, let alone accepted, a referral by a member state against a non-member state. Each situation referred by a state involved itself or another state that had accepted the Court's jurisdiction.
- » The ICC has never decided any issues about the status of disputed territory, or prosecuted any alleged crimes arising in disputed territory.
- » The ICC has never pursued crimes that do not involve large-scale murder and extreme brutality.
- » Finally, no court of any kind – national court or international tribunals from Nuremberg – has ever prosecuted anyone for “settlement activity,” despite an abundance of potential targets from Morocco to Turkey to Syria.

The Long Campaign to Target Israel at the ICC

Israel, like the United States, has never joined the ICC. Despite Israel's initial support for such a court, and its strong commitment to the notion of international law, it was convinced, in light of the terms of its Statute and the politically inspired nature of some of its provisions, that the Court would reflect the broader bias against Israel found in such international bodies as the U.N. Human Rights Commission. The bias is baked into the Court's statute. The section of the Court's jurisdiction that defines war crimes borrows its definitions word-for-word from the Geneva Convention – with one major exception. At the drafting conference, Arab nations endorsed changing the language of the provision that many see as bearing on the legality of settlements – the prohibition on “deporting and transferring” civilians into occupied territory. The Arab League, led by Syria and Egypt, over US and Israeli opposition, succeeded in inventing an entirely new offense previously unknown to international criminal tribunals – “indirect” transfer, which was designed to make a war crime out of voluntary and free movement of Jews into the territories of Judea and Samaria. This language, which represented politically inspired departure from the purposes for which the initial prohibition had been inserted into the Fourth Geneva Convention in 1949, was specifically and deliberately targeted at Israel, and thus Israel did not become party to the Statute.

Thus Israel is presumptively outside the court's limited jurisdiction, unless it acts in the territory of an ICC member. As it happens, none of Israel's neighbors are member states either. Yet the Palestinian leadership has been trying to invoke the Court's jurisdiction for years now. In doing so, they face two obvious problems: Israel has not accepted the Court's jurisdiction. And only "states" can do so; the Palestinian claim to a status as a state has been murky, at least in part because of its leadership's alternating descriptions of themselves as a state and an occupied territory aspiring to statehood.

In January 2009, in the wake of Palestinian-Israeli hostilities in Gaza, the Palestinian Justice Minister submitted a Declaration to the ICC accepting the jurisdiction of the ICC under Art. 12(3), which permits non-member nations to give the ICC jurisdiction over particular situations on an ad-hoc basis.¹¹ After a long consideration, the Prosecutor in April 2012 announced that he would not proceed with an investigation because Palestine was not a "state" within the meaning of the ICC Statute.

In determining what entities qualify as "States," the Prosecutor said he would be guided by determinations of the General Assembly, which did not treat Palestine as a state.¹² While at first this seemed a setback for the Palestinians, it also offered an opportunity. It suggested that the Office of the Prosecutor (OTP) would not look to objective *indicia* of statehood, such as the Montevideo Convention factors, but rather accept as binding the political determinations of the UN General Assembly (GA). If the GA would recognize Palestine, the Prosecutor could feel free to act, despite Palestine's not being a member of the United Nations and arguably not fitting traditional statehood criteria.

Thus the Palestinians turned their efforts to securing GA recognition. In a closely watched vote on Nov. 29, 2012, the GA granted "Palestine" "non-member-state observer" status.¹³ It is a testament to the centrality of lawfare to the Palestinian strategy that the move was widely understood as specifically designed to facilitate an ICC action.¹⁴ Indeed, this was the first time a nation sought UN membership specifically to be able to threaten ICC proceedings. Indeed, several powerful Security Council members that did not support the resolution but were sympathetic to it offered to vote in favor if the Palestinians promised not to turn to the ICC.¹⁵ In the wake of the resolution's passage, commentary and media coverage focused on the new possibility of an ICC case involving Israeli military campaigns against terrorists in Gaza, and even more significantly, the entire existence of Jewish settlements in the West Bank, which many have long regarded as violating laws of war treaties.¹⁶

Of course, the majority vote in the GA does not have the power or authority to turn a territory into a state, for the ICC or any other purposes. (The Palestinians know this, which is why they had first sought the more-authoritative recognition of the Security Council, and been rejected.) The Court has a new Prosecutor, who is not bound by her predecessor's policy of looking to the GA for statehood determinations. Statehood is undefined in the Statute, and the new Prosecutor is free to make an independent determination based on objective criteria such as control of territory, or take some other approach.

But even assuming, *arguably*, Palestine is now a state (does this mean there is no longer a need for a two-state solution?), Israel is still not a state party. The Court could only have

jurisdiction over Israeli activity “in the territory” of Palestine. Yet Israeli settlements are not in “the territory of Palestine” – which does not legally or factually exist – rather, they are in disputed territory where Israel exercises full criminal jurisdiction pursuant to express agreements with the Palestine Liberation Organization.¹⁷ Thus the Palestinians cannot give the Court jurisdiction over Israeli civilian communities. This is a fundamental limit on the power of the Court, and bears some elaboration.

Even if “Palestine” is a State, Settlements are Outside Its Jurisdiction

The International Criminal Court operates primarily on the principle of delegated jurisdiction, not universal jurisdiction.¹⁸ Its jurisdiction depends on the consent of states, and thus it can only prosecute crimes that occur in the territory of consenting states, or were committed by their nationals. Thus far, the territorial and nationality jurisdiction has coincided: the ICC has only pursued investigations in situations involving crimes on the territory of member states when the alleged perpetrators are themselves nationals of the member state. The most controversial aspect of the ICC’s jurisdiction has always been its application to nationals of non-member states for conduct on the territory of member states.¹⁹ Yet such jurisdiction is consistent with national sovereignty because the member state itself has jurisdiction under traditional territorial principles over the non-member nationals; it can thus delegate its own jurisdiction to an international tribunal.

This poses an important, if novel, jurisdictional bar to a Palestinian referral focused on settlements. Under Art. 12 of the Statute, the ICC could only have jurisdiction over Israel for conduct that occurred “on the territory” of the State of Palestine.²⁰ Thus, exercising jurisdiction requires first determining Palestine’s territory. The Rome Statute presumes defined, accepted international boundaries (most boundary disputes are quite minor and have thus far been irrelevant to the crimes within the ICC’s jurisdiction). When these assumptions are not satisfied, the Statute provides no guidance for dealing with territorial “gray areas.”²¹

The “territory” of Palestine is not at all established.²² Similarly, Israel lacks some defined borders. In short, the borders of any state or states that have arisen in the territory of the League of Nations Mandate for Palestine remain entirely undefined. Accepting a Palestinian referral would make the scope of the ICC’s jurisdiction always indeterminate – non-member nations would be vulnerable to ICC suits simply by neighbors convincing the Court that a certain territory is theirs. Such action would also greatly discourage membership by nations with disputed frontiers. Territorial jurisdiction was envisioned as useful for self-referrals of the kind the ICC has dealt with so far, and clear aggression and invasion of previously recognized sovereign frontiers.

The ICC has not been understood as a border-determination body; defining the territory of nations has never been part of the work of past international criminal tribunals.²³ The border

demarcation role more naturally falls to the International Court of Justice, and even then only when both parties consent to jurisdiction.

The jurisdictional question of borders cannot be resolved by previewing the substantive legality of settlements. The origin of the “settlements” norm is Art.49(6) of the Fourth Geneva Convention, which provides that the “occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.” In the drafting of the Rome Statute, the Arab states successfully proposed modifying the Geneva language to “directly or indirectly deport or transfer.” The inclusion of this language was thought to specifically target Israel’s settlements, and was the reason it did not join the treaty.

For “transfer” to be a crime, the relevant territory must be occupied. Israel has long argued that the underlying Geneva Convention provisions regarding occupation are limited to the “occupation of the territory of a High Contracting Party.”²⁴ The West Bank was not Jordanian sovereign territory when Israel took it in 1967. Because the territory did not belong to a High Contracting Party when occupied, the argument goes, the rules regarding occupation do not apply.

Yet many international lawyers reject this argument, concluding that the Conventions’ protections are intended to have broader scope, and apply (at least) to all wars between member states. However, such a conclusion does nothing to establish the “territory” of a Palestinian state. The central difficulty for ICC jurisdiction is that the mere fact of Israeli occupation does not mean the territory falls under Palestinian sovereignty. The dominant interpretation of the Geneva Conventions is that an “occupation” can arise even in an area that is not the territory of *any* state. Thus even if Israel is an occupying power throughout the West Bank for the purposes of substantive humanitarian law, this does not establish that settlement activity occurs “on the territory” of the Palestinian state.

To put it differently, while violations of the anti-transfer norm may not need to take place in the territory of a state to constitute a *violation*, they still must be “on the territory” of a state for the ICC to have *jurisdiction*. This is because the ICC is not a court of general or global jurisdiction; its jurisdiction does not extend to all violations of humanitarian law anywhere in the world. This is consistent with the respective roles of the Geneva Conventions and the ICC. The Geneva Conventions, which have near universal adherence, are interpreted broadly because of a desire to not have gaps in coverage. With the ICC, which has a limited and particular jurisdiction, gaps in jurisdictional coverage are purposeful and inherent.²⁵

The lack of clear territorial jurisdiction would be particularly troubling because the underlying crime is not one of universal jurisdiction. Any and all nations have jurisdiction of universal jurisdiction crimes; no territorial connection with the offense is needed (though custody of the defendant may be required). An alternative theory of the ICC’s jurisdiction is that it exercises even delegated universal jurisdiction, not merely delegated territorial jurisdiction.²⁶ This account is not the dominant one, but certainly to the extent crimes within the Court’s jurisdiction are universally cognizable, concerns about non-member nationals are somewhat attenuated.²⁷ Yet not all crimes within the ICC’s charter are universal.²⁸ Perhaps the most salient exceptions are aggression²⁹ and non-grave breaches of the Geneva Conventions,

of which “transfer” is one. Not only does the Geneva regime not make “transfer” universally cognizable, there is no subsequent precedent of universal jurisdiction being applied to the offense.³⁰

One might think that just as the ICC would not determine statehood by itself but rather rely on the decisions of other UN agencies, it might also choose to take borders as a factual determination that could be made by the political branches. Even assuming the dubious validity of this approach,³¹ neither of the two prominent (but non-legally binding) international statements on Palestinian rights purported to determine borders. Despite their condemnation of Israeli settlements, neither the GA resolution acknowledging Palestinian statehood, nor the earlier International Court of Justice condemnation of the construction of Israel’s security fence, contained any express or implied borders determinations.

The General Assembly resolution of Nov. 2012 does not answer the question of Palestine’s borders, and does not even address it. The resolution merely “decides” to accord Palestine non-member status in the GA; it decides nothing about borders.³² Even the non-operative provisions are unclear as to borders. On the one hand, Par. 1 refers to “Palestinian territory occupied since 1967.” This appears to be more of a claim about indigenous rights than a determination of national borders, as there was no Palestinian state or entity in 1967. On the other hand, Par. 4 expresses hope for the eventual “achievement” of a “contiguous Palestinian state living side by side in peace and security with Israel *on the basis of the pre-1967 borders*,” suggesting that the Israel-Jordanian armistice line is not the operative or ultimate border. Moreover, it suggests that the Palestinian state does not yet have these borders (as it is certainly not contiguous).³³ The “on the basis” language has traditionally referred to adjustments in the 1949 Armistice Lines to include most Israeli settlements within Israel’s borders. The Resolution also calls for a diplomatic process to “resolve the outstanding core issues” such as the fate of “Jerusalem, settlements, borders.”³⁴ This makes clear that borders are an “outstanding” issue: the Assembly did not see its resolution as determining any of the territorial questions that must be central to an ICC investigation of settlements.

Even if the GA resolution did express a view on Palestine’s borders, it is not binding or authoritative. The General Assembly has an internal bureaucratic power to determine its membership. That determination may or may not be the required trigger for “statehood” for ICC purposes – even that is unclear.³⁵ But determining the territory of states goes beyond any of the General Assembly’s recognized powers.

Similarly, the ICJ opinion recognized the difference between the existence of occupation (which does not require the occupied territory to be sovereign) and borders, which delimit the territories of two separate sovereigns.³⁶ The Court selfconsciously avoided any resolution of “permanent status” issues such as borders.³⁷ It also made clear that the 1949 Armistice Lines, while in its view triggering the applicability of Geneva Conventions and other principles, do not constitute an international boundary.³⁸ Indeed, the Court specifically criticized the route of the wall because it could “prejudge the future frontier between Israel and Palestine.”³⁹ Thus in the view of Court, there was no recognized frontier between the two entities. If the Green Line were the recognized “frontier,” the Wall would not prejudice it, but rather simply infringe on it.

Adjudication by international tribunals, including the ICC, depends fundamentally on state consent. As a result, the International Court of Justice held in the influential *Monetary Gold* case that it could not determine the legal rights and duties of a state that was not party to the case and that had not given its consent.⁴⁰ Thus, where the decision of a case necessarily requires the adjudication of the legal interests of a non-consenting state, the Court cannot exercise jurisdiction. This principle extends beyond the ICJ; other international tribunals have treated the principle as part of the general international law applicable to international tribunals:

[T]he consent principle applies to the ICC as it does to other international Tribunals. Were the ICC to make judicial determinations on the legal responsibilities of nonconsenting States with respect to the use of force and aggression, this would violate the Monetary Gold principle.⁴¹

To exercise jurisdiction, the Court necessarily must decide on the borders of Palestine, which simultaneously determines the borders of Israel, a non-member. In order to reach the issue of individual liability, the Court must first draw the borders of a non-consenting state – as clear a violation of the *Monetary Gold* principle as one could imagine.

Turkey and the Flotilla

The Israeli interdiction of the Turkish-sponsored, Gaza-bound flotilla has been fodder for multiple international investigations, Israeli investigations, and extensive diplomatic discussions between Ankara and Jerusalem. Shortly after Israel and Turkey reportedly came to a rapprochement about the affair, the island nation of Comoros referred the situation to the Prosecutor. While neither Turkey nor Israel are state parties, one of the Turkish-owned vessels in the flotilla had been reflagged to Comoros – flags of convenience, as they are known, are quite loosely regulated under international law. Thus the vessel was technically on the territory of Comoros. Yet Comoros was clearly just a front – an Istanbul law firm drafted the referral itself.⁴² The Turkish use of such a straw man to invoke the ICC's jurisdiction despite the settlement with Israel is undiplomatic and abusive, but within the letter of the Court's statute. The territoriality argument is technical, but sound, just as the Palestinian one is unsound.

Yet the Comoros referral suffers from even greater disabilities. For one, it grossly fails the requirement of complementarity. The ICC can only act when nations with primary jurisdiction are "unable or unwilling" to "genuinely" investigate.⁴³ Israel conducted a full and thorough inquiry into the flotilla incident and found no crimes occurred. The vessels ran a blockade, giving Israel a legitimate right to stop it; when confronted with force the boarders acted in self-defense. This is far from a clear violation of international law. And while one might criticize the inquiry, many leading scholars concurred, making it very difficult to criticize Israel's inquiry as a sham to avoid responsibility. Obviously any national inquiry could be perceived as self-interested, but the complementarity system nonetheless defers to such proceedings unless they are manifestly self-dealing. If Israel's inquiry fails the complementarity test, any national inquiry that does not result in prosecution would be inadequate – contradicting the clear

language of the Statute, which clearly sees non-strategic non-prosecution as enough to make a matter inadmissible before the Court.⁴⁴

But even beyond the Israeli proceedings, Turkey has initiated a prosecution and trial of the Israeli military personnel in the flotilla incident.⁴⁵ It would defy credulity to suggest these proceedings aim to immunize Israeli officials.⁴⁶ Moreover, the Comoros referral fails to meet the “gravity” requirement for ICC cases. The ICC is designed to not deal with every colorable incident of war crimes, but only with the most awful and systematic. While the statute does not define the “gravity” requirement, the killing of nine armed people in an isolated incident, arguably in self-defense, manifestly fails this requirement. The ICC prosecutor has already rejected charges against British troops in Iraq as failing to meet the gravity requirement when a similar number of deaths were involved.⁴⁷

The manifest weakness of the Comoros referral underscores that the purpose of such proceedings is not to secure convictions, but to exert political pressure on Israel regarding matters already subject to diplomacy, and cast a shadow on the legitimacy of the Jewish state. Thus such actions pervert the function and purpose of the Court. At the same time, the Comoros referral is so weak and manifestly unlikely to succeed, that one wonders whether its true purpose is even just to embarrass, as it seems too far outside the ICC’s mandate even for that. Rather, the Comoros suit may be best viewed as a political action to accompany, and precede, a Palestinian referral. The Comoros filing came just as matters between Israel and Turkey had nominally been resolved or at least ameliorated – but even as a possible Palestinian referral seemed imminent.

A Palestinian referral, if it resulted in an investigation, would certainly expose the Court to accusations of anti-Israel bias, especially given how far such a matter would go beyond the Court’s mission and mandate. However, if it had already rejected one referral against Israel, the Court would need some political cover, however thin, to protect it against such charges. While it may seem paranoid to suggest such machinations, it is widely thought to be a priority for the Court to “balance” its docket with matters not involving African states to hedge against accusations of neo-colonialism.⁴⁸ The suggestion here is that the pathetic flotilla case is a “loss leader,” or a kind of set-off for a subsequent Palestinian referral.



Notes

1. http://www.google.com/hostednews/afp/article/ALeqM5i5tc0voVhdjx1rpqg_Rqk2B6k8GQ?docId=CNG.ec7b73e3bc421b8b5a3d5be7d0e31e42.9b1&
2. See Anne Herzberg, *Lawfare: Exploitation of the Courts in the Arab-Israeli Conflict* (2d. ed 2010), available at <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>
3. Chaim Levison, *Netanyahu ordered evacuation of Hebron home over fears of war crimes suits*, Haaretz.com, May 13, 2012. An appellate panel subsequently upheld the legality of the Israeli purchase of the house. See Stuart Winer, *Settlers receive boost in battle over Hebron home*, Times of Israel (July 1, 2013), available at <http://www.timesofisrael.com/settlers-receive-boost-in-battle-over-hebron-home/>

4. Khaled Abu Toameh, PA to halt ICC plans against Israel as peace gesture, Jerusalem Post, May 5 2013.
5. Jack Khoury, *If peace talks fail, Abbas will have to answer to Palestinian people, not Kerry*, Haaretz.Com, July 20, 2013.
6. This is not due to any bias on the Prosecutor's part. Rather, Africa has a large number of countries that have both accepted the Court's jurisdiction, and are the sites of mass atrocities and bloody, prolonged wars. Indeed, most of the African cases were so-called "self-referrals," where a country invites the ICC in itself to help it prosecute criminals it could not handle itself; and another two were referred to the Court by the Security Council.
7. Most people would be unaware that countries such as Columbia and Russia are subject to preliminary investigations by the prosecutor.
8. Human Rights Council, *Report of the independent international factfinding mission to investigate the implications of the Israeli settlements*, par. 17, 104, U.N. Doc. A/HRC/22/63 (Feb. 7, 2103).
9. Current situations include the activities of the genocidal Lord's Liberation Army in Uganda, the crimes against humanity in the Congo, the genocide in Darfur, war crimes in the Central African Republic, the use of child soldiers and other brutalities during the civil war in the Cote d'Ivoire, the Islamist oppression in Mali, Qaddafi's repressive campaign during the Libyan civil war, and the ethnic massacres surrounding Kenya's elections.
10. See Rome Statute of the International Criminal Court, Art. 12(2), U.N. Doc. A/CONF.183/9*.The Security Council can also refer a case to the Court, as it did with Libyan and Sudan/Darfur.
11. Sung Un Kim, *ICC lacks jurisdiction to investigate Palestine war crimes claims: prosecutor*, Jurist (April 3, 3012).
12. The Situation in Palestine, par. 5-8, available at <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB94FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.
13. U.N. Doc. A/RES/67/19. Only the Holy See currently shares the status, though in the past a number of other nations, such as Switzerland and Spain have had it.
14. See Mahmoud Abbas, *The Long Overdue Palestinian State*, N.Y. Times A27 (May 17, 2011) ("Palestine's admission to the United Nations would pave the way for the internationalization of the conflict as a legal matter, not only a political one.). See also Ethan Bronner & Isabel Kershner, *Palestinians Set Bid for U.N. Seat, Clashing With U.S.*, N.Y. Times A1 (Sept. 17, 2011) ("One goal of the move is to gain admission to a range of international legal and diplomatic forums where complaints against Israeli occupation and settlement could be pursued.").
15. See Chris McGreal, *Palestinians warn: back UN statehood bid or risk boosting Hamas*, The Guardian (Nov. 27, 2013), available at (mentioning the U.S., U.K., and France as among nations wanting to link an affirmative vote to promises of avoiding the ICC).
16. See, e.g., George Bishart, *Why Palestine Should Take Israel to Court in The Hague*, N.Y. Times (Jan. 29, 2013); Aeyal Gross, *Following UN vote on Palestine, Israel may now find itself at The Hague*, Haaretz (Dec. 2, 2012); Christine Hauser, *New U.N. Status for Palestinians Could Open Door for Claims of Israeli War Crimes*, N.Y. Times A8 (Nov. 30, 2012).
17. Interim Agreement, Art. XVII.1.a, article XVII.2.c, article XVII.4 (1995); Interim Agreement Annex IV, Art. II(c).
18. Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, 1 J. Int'l Crim. J. 618, 621-34 (2003)
19. Id. at 619-21 (describing American objections to jurisdiction over non-party nationals).
20. Art. 12(2)(a).
21. See Schabas, Introduction to the international criminal court 82.

22. See *id.* at 88 (“the actual limits of the territory of Palestine are also a matter of dispute”); David Luban, *Submitting to the Law of Nations: Palestine, Israel, and the International Criminal Court*, Boston Rev. (Dec. 12, 2012) (“The ICC is a special-purpose criminal court, and it would be astounding for it to get out in front of the UN’s own court on a fundamental question about the map of the world.”)
23. Schabas, Introduction to the international criminal court at 82.
24. IV Geneva Convention Relative to the Protection of Civilians Art. 2, par. 2 (1949).
25. William A. Schabas, *An Introduction to the International Criminal Court* 82 (2011) (observing in regard to areas without an established sovereign that “some territories are necessarily beyond the reach of the Court,” and jurisdiction could only be secured by the nationality of offender).
26. See Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *Law & Contemp. Prob.* 12, 25-26 (2001)
27. See Akande, *Nationals of Non-Parties*, *supra*, at 626-27.
28. See Morris, *supra* at 28 & n.72 (using child soldiers as example of ICC crime not subject to UJ).
29. See Akande, *Aggression*, at 26.
30. Additional Protocol I to the Geneva Conventions treats an expanded version of the “transfer” norm as a “grave breach.” Some argue the Optional Protocol has acquired customary status – despite not being ratified by major powers such as the U.S., India, Pakistan, Turkey, and of course, Israel – but there is no evident state practice to support such a custom.
31. The occurrence of conduct on the territory of a member state is a jurisdictional fact and thus one the Court must convince itself of.
32. See *Status of Palestine in the United Nations*, U.N. Doc. A/67/L.28, par. 2 (Nov. 12, 2012).
33. *Id.* (emphasis added).
34. *Id.* at 5.
35. See Dapo Akande, *ICC Prosecutor Decides that He Can’t Decide on the Statehood of Palestine. Is He Right?*
36. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ 2004).
37. *Id.*, par. 52-54; see also Separate Op. of J. Higgins, par. 17.
38. Thus the Court recognizes that the Mandate created international “territorial boundaries,” while the 1949 Armistice Agreement did not. *Id.* at par. 71-72. The Court’s repeated references to “Occupied Palestinian Territory,” a term taken from the language of the G.A. request for an opinion, do not involve any determination that the territory “belongs” to the Arab population. Rather, it is that portion of Mandatory Palestine that Israel forcibly occupied in 1967, after ousting the Jordanian occupation. Par. 73.
39. *Consequences of Construction*, Par. 121 (emphasis added).
40. *Italy v. France, United Kingdom, and United States*, ICJ Rep. (1954) at 19.
41. See Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council*, Oxford
42. Institute for Ethics, Law and Armed Conflict Working Paper, at 26 (May 2010).
43. http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-14-05-2013.aspx
44. Rome Statute, Art. 17(b).

45. Similarly, a UN-sponsored international inquiry concluded that “the incident and its outcomes were not intended by” Israel. Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident (Palmer Report), pg. 4 (Sept. 2011).
46. Gul Tuysuz, CNN, Trial opens in Turkey against Israeli military officers in 2010 ship raid, Nov. 6, 2012. Turkey launches 5th hearing of Mavi Marmara trial, TurkishPress.com, May 20, 2013, available at <http://www.turkishpress.com/news.asp?id=385074>.
47. Yonah Jeremy Bob, ‘Turkey Marmara trial a cynical political process’, Jerusalem Post, Feb. 20, 2013,
48. http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf, pg. 9
49. <http://www.ejiltalk.org/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gazafлотilla-to-the-icc/>

THE FAILURE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Amb. Alan Baker

- » There is a growing concern that the International Criminal Court (ICC), established with the adoption of the Rome Statute of 1998, is irreparably and institutionally flawed and politicized. The ICC has failed to live up to the hopes and visions of its founding fathers.
- » The ICC was established after a long process of negotiations inspired by a post-World War II vision of the need to ensure that the perpetrators of the most egregious crimes known to humanity would not enjoy impunity and immunity. They would be brought to trial before an independent, apolitical, international juridical body.
- » Regrettably, and despite the best intentions of its founders, the very independence and impartiality of the Court – so central and obvious for any such vital and important juridical body – was flawed from the outset by constitutionally linking the Court with the United Nations.
- » Placing part of the ICC's financing at the political mercy of the UN General Assembly undermines and prejudices any pretention of independence of the Court. Funding of the ICC, like any other action requiring approval in the UN General Assembly, is, of necessity, a process driven by the political and economic interests of its members and subject to political bargaining that is unconnected to the needs of the Court.
- » The acceptance of a "Palestinian state" as a fully-fledged member state by the Court is an example of how the ICC is dependent upon political determinations of the UN's General Assembly. The Palestinians have adopted the ICC as their own "back-yard tribunal" for baiting Israel. They regularly submit referrals against Israel's leaders and settlement policy. In so doing, they are politicizing the Court.

In the aftermath of the atrocities committed by Nazi Germany during the Second World War, and following the 1945-6 Nuremberg trials of the major Nazi war criminals, leading international jurists started to devise a statute for an independent, international juridical body that would adjudge all such criminals.

However, pending the establishment of a permanent international criminal tribunal, the atrocities committed during the conflicts in Yugoslavia (1991-2001), Rwanda (1990-1993), Sierra Leone (1991-2002), Cambodia (1975-1979), and Lebanon (2004-2005) accentuated the urgent need for international criminal adjudication of the war criminals involved in those atrocities. To this end, individual, temporary ad-hoc tribunals, similar to the Nuremberg Tribunal, were established by the UN to deal with each specific conflict. Such tribunals

included the “International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991” (ICTY),¹ the “International Criminal Tribunal for Rwanda” (ICTR),² the “Special Court for Sierra Leone,”³ the “Extraordinary Chambers in the Courts of Cambodia,” and the “Special Tribunal for Lebanon.”⁴

The Importance of a Permanent International Court

The Cold War delayed advancing the vision and drafting of a statute for one, universal, and independent international criminal court, rather than individual criminal tribunals to deal with specific conflicts. Due to the difficulties in negotiating the details of a statute between the major political blocs, the Court was ultimately established after the break-up of the Soviet Union, with the adoption of the 1998 Rome Statute, following a series of international conferences sponsored by the UN.⁵

Dependence on the United Nations

Regrettably, and despite the best intentions of its founders, as well as some noble sentiments set out in the preambular paragraphs of its Statute, the very independence and impartiality of the Court – so central for any such vital and important juridical body – was flawed from the outset.

The central preambular provision of the Court’s founding statute determined, on the one hand, that the Court would be an “independent permanent International Criminal Court,” but it backtracked and neutralized such independence by bringing the Court into a curious “relationship with the United Nations system.”⁶

The Statute even strengthened this relationship and linkage by “[r]eaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”⁷

While a reaffirmation of this central provision of the UN Charter may well be an important component of any international instrument, its inclusion in the central preambular provision of the founding document of the International Criminal Court, ostensibly independent of the UN, is somewhat puzzling and lacks logic.

This issue of the Court’s independence vis-à-vis the UN arose in 1997, during the debates in the UN General Assembly’s Sixth (Legal) Committee, when the representative of Trinidad and Tobago, one of the founding fathers of the vision of an international criminal court, stated:

*The proposed international criminal court should be an independent body and not subordinate to or a subsidiary of the Security Council.*⁸

UN Funding

While the Court is ostensibly independent of the UN, the Statute nevertheless determines that, in addition to assessed contributions by the states parties to the Statute, the Court is financed by:

*[F]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.*⁹

Approval of funding, like any other action requiring approval in the UN General Assembly, is, of necessity, a process driven by the political and economic interests of its members and subject to political bargaining that is totally unconnected to the needs of the Court. Clearly then, placing the court's financing at the political mercy of the General Assembly can only serve to undermine and to prejudice any pretention of independence of the Court.

Assembly of States Parties

In a similar manner, the establishment by the Statute of an "Assembly of States Parties" as "the Court's management, oversight, and legislative body composed of representatives of the states that have ratified the Rome Statute," places the judicial independence of the Court at the whim of a political majority of such an obviously political, non-judicial entity.¹⁰

For all intents and purposes, this "Assembly of States Parties" whose meetings take place generally at UN headquarters, is a cut-and-paste version of the UN General Assembly, with identical political groupings for purposes of voting, consultation, political wheeling-and-dealing, and geographical representation.

In a recent critique of the functioning of the "Assembly of States Parties," published in 2017 by the *Journal of International Criminal Justice*, entitled "Challenges to the Independence of the International Criminal Court from the Assembly of States Parties" it was stated:

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) plays a significant role in relation to the ICC and, by extension, international criminal justice.

Non-governmental organizations and some states have expressed concern about the potential for the ASP process to unduly influence the exercise of the judicial and prosecutorial functions of the ICC.

This article uses three examples stemming from recent ASP sessions to analyse the ASP's potential to influence the work of the Prosecutor and the Chambers of the ICC: (1) the ASP's legislative function with reference to ASP changes to the ICC Rules; (2) the non-cooperation of Rome Statute parties with the ICC; and (3) the budget approval process. It argues that the ASP risks undermining the ICC's judicial and prosecutorial independence.¹¹

On the issue of the Court's independence, four former presidents of the ICC's Assembly of States Parties stressed, in a recent op-ed article published by The Atlantic Council:

States have to stand up for the ICC in its mission to be judicially independent, even, or in particular, in situations where that may be politically inconvenient.¹²

On October 29, 2018, at a UN General Assembly Plenary discussion on the functioning of the Court, similar sentiments were expressed by the Philippines, announcing its decision to withdraw from the Court due to the politicization of human rights. Sudan also criticized the ICC, saying that the perception of the Court is that the ICC is part of the UN. Canada also stressed that the Court must "operate without obstruction, beyond power, politics, and geopolitics."¹³

Since the Court was established by way of a multilateral treaty and derives its power and authority from its founding treaty, the ICC Rome Statute, legal logic would assume that, like any other multilateral treaty, it should be an entirely separate and independent entity, and not dependent upon the links or whims of the United Nations.

The Court's character as an independent international institution should be all the more evident considering that its Statute is not merely another multilateral treaty establishing another multilateral organ, but establishes a juridical institution that cannot and should not be dependent upon a political framework, such as the UN. This cannot but influence the Court's judicial work.

However, in light of the structural linkage to the UN system, and the fact that the United Nations is the center of that system, this curious linkage and self-inflicted dependency on the UN Charter principles are being interpreted to mean that there is a need to coordinate the Court's judicial role with the UN's responsibility to maintain peace and security.

The fact of this linkage to the UN and the dependence on a political organization implies that the Court cannot claim to be an independent and apolitical juridical organ. As such, this belies the basic principle of independence underlying such a serious juridical body.

Clearly, any such entity negotiated under the sponsorship of the UN and based on UN groupings and political pressures, cannot be independent or impartial, since every vote is ultimately determined on the basis of political interests and deals.

In an editorial comment in 2005 in the *American Journal of International Law*, entitled “Judicial Independence and Impartiality in International Criminal Tribunals,” Prof. Theodor Meron, former President of the International Criminal Court for former Yugoslavia observed:

Judicial independence is critical for the rule of law. First, judges who are independent of political or other pressures, will adjudicate the disputes brought to them with an eye to the guiding legal principles and without any undue influence by external sources.¹⁴

The linkage with the UN has plagued the Court since its inception and has increasingly enhanced the perception that the ICC has, in fact, become a quasi-UN agency. The ICC is dependent on the UN for funding, dependent on the UN voting system for election of its judges, and tied to the UN through a formal relationship agreement with the UN.

The Politicization of the Court – Acceptance of a Non-Existent State of Palestine

In addition to having developed a cumbersome bureaucracy and a vast array of expenses, the UN linkage has caused the Court to become politicized. This linkage has also enabled manipulation by political elements intent on furthering their own partisan aims, in a similar manner as within the UN and other organizations within the UN system.

Such dependency is amply reflected in the manner in which it has been obliged by the UN to handle the issue of Palestinian accession to its Statute and the resultant manipulation, abuse, and politicization of the Court by the Palestinian leadership in its obsession with Israel.

The acceptance of a non-existent Palestinian state as a fully-fledged member state in the Court is perhaps an example of how the Court is dependent upon political determinations of the UN’s General Assembly and Secretary-General. It cannot function in the independent ambiance that one assumes should serve as the basis for the functioning of such an important international judicial body.

Acceptance of Palestinian Membership in the Court

In a statement issued on April 2, 2012, former ICC Prosecutor Louis Moreno Ocampo declined to accept a 2009 Palestinian application for membership to the Court in light of the non-existence of a Palestinian state. However, he was obliged to refer the question of Palestinian statehood to “competent organs of the United Nations or eventually the Assembly of States Parties to resolve the legal issue relevant to an assessment of article 12.”¹⁵

The constitutional linkage of the ICC to the UN, in effect, required the Prosecutor to refer the question for political determination to the UN, rather than to refer it for substantive juridical determination to the appropriate body of judges of the Court.

The Palestinian accession to the Statute as a “state” party was subsequently accepted in 2015 by the UN, acting as depository of the ICC Rome Statute, and subsequently by the ICC Prosecutor and Assembly of States Parties. The basis for accepting Palestinian accession to the Statute was a non-binding resolution of the UN General Assembly 67/19 on the “Status of Palestine in the United Nations” that upgraded the status of the Palestinian delegation to the UN to “non-member observer state status.”¹⁶

Curiously, while upgrading the Palestinian status to that of a non-member state, the same General Assembly resolution acknowledged that there is not yet such a state, pending a negotiated settlement of the status of the territories. To this end, the Assembly reaffirmed the call for negotiations “for the achievement of a just, lasting, and comprehensive peace settlement between the Palestinian and Israeli sides.”¹⁷ But this did not prevent acceptance by the Court of a Palestinian “state” member.

The UN General Assembly, as a political and not a law-making body, does not have the legal powers or prerogative to declare or establish statehood. Nor does it have the legal capacity to proffer legal grounds for acceptance of accession by a non-state of Palestine to the ICC Statute.

Since the ICC’s Statute is open to “States Parties” only, and since there exists neither a Palestinian state, nor any agreed-upon and accepted sovereign Palestinian territory, the assumption that “Palestine” can be party to the Statute is legally flawed. Similarly, the assumption that the Palestinians can engage the jurisdiction of the Court vis-à-vis territories that are acknowledged by the UN to be disputed and pending final settlement, is no less legally flawed. Thus, the ICC cannot constitute grounds for accepting referrals of Palestinian complaints.¹⁸

This Palestinian attempt to engage the Court and to claim that the territories are part of a Palestinian state is also at variance with the Oslo Accords, according to which, “Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.”¹⁹

In this context, the UN has endorsed the Oslo Accords in various resolutions. By acknowledging Palestinian statehood and by signaling to the ICC that it could accept a non-existent Palestinian state as a full “State Party” to the Rome Statute, the UN has, in fact, legally undermined its own endorsement of the Oslo Accords.

Despite the lack of legal grounds and in clear contravention of the terms of the ICC Statute, which relies upon “States parties” for the functioning of the Court, the Palestinian non-state was accepted as a fully-fledged state party to the Court.

Palestinian Referrals of Complaints against Israel

Pending the outcome of Israeli-Palestinian negotiations on the permanent status of the territories as agreed upon in the 1995-1999 Oslo Accords, there exists no agreed-upon legal or political determination regarding the sovereign status of the disputed territories. The topic remains an agreed negotiating issue between the Palestinians and Israel, pending the outcome of the permanent status negotiations.

Acceptance by the ICC of the Palestinian declaration claiming that the territories are Palestinian sovereign territory for the purpose of extending the Court's jurisdiction to actions in the territories not only lacks any legal validity but also attempts to prejudge the outcome of an open negotiating issue.²⁰

The Court has never yet judicially determined the legal validity or standing of the Palestinians vis-a-vis the Court, nor has it made any juridical determination as to whether the Court may extend its jurisdiction over territory that is disputed but claimed by the Palestinians to be their territory. However, the Prosecutor has proceeded, pursuant to the court's procedural rules, to institute preliminary examinations of these complaints and the applicability of the Statute to such situations.

Logically and legally, without any internationally accepted and recognized, agreed-upon permanent status of the territories, and without any binding international determination that there exists a Palestinian state with its own sovereign territories, it is highly unlikely that the Court would be able to exercise jurisdiction.

However, on the strength of their having been accepted as a state party to the Statute, the Palestinians have adopted the ICC as their own "back-yard tribunal" for baiting Israel. They regularly submit referrals against Israel's political and military leaders accusing them of war crimes committed during the various military confrontations, as well as regarding Israel's settlement policy. In so doing, they are politicizing the Court and treating it in the same manner in which they treat the various other international institutions and organizations with which they are involved, much to the detriment and credibility of the Court.

Assumption of *Bona Fides* by the Court

Despite procedural or political action by the prosecutor to process such complaints, it is hoped that the Court's judges would act in an objective manner befitting an international juridical and non-political body. Clearly, any perception of politicization of the Court would endanger its juridical integrity – something the Palestinians are indeed attempting to achieve with every complaint.

Indeed, in an unusually apt statement issued by Fadi El Abdallah, Spokesperson and Head of Public Affairs Unit of the ICC on September 12, 2018, in response to criticism of the Court by John Bolton, former U.S. National Security Advisor, he stated:

The Court is an independent and impartial judicial institution. The ICC, as a court of law, will continue to do its work undeterred, in accordance with those principles and the overarching idea of the rule of law.²¹

Conclusion

In light of the questionable legal status of the Palestinians vis-à-vis the Court, as well as the clear lack of jurisdiction of the Court in territories that are acknowledged internationally to be in dispute and pending settlement, it might be expected that the Court, acting in accordance with the principles of objectivity, would not permit itself to be abused. This expectation is all the more pertinent given the inherent lack of gravity of the crimes complained-of.

But the question remains whether the ICC, in light of its inbuilt, constitutional linkage to and dependence upon political determinations by the various the UN bodies, has the capability to overcome such limitations and act in a truly judicial manner.

If it cannot, then there is a need to go back to the international drawing board and to think again as to how to have a genuinely independent juridical body. This body must be devoid of any linkage to political entities so that there would not be any political considerations in electing judges and staff or in its general judicial functioning.

Time will tell.



Notes

1. http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf
2. <http://legal.un.org/avl/ha/ictr/ictr.html>
3. <http://www.rscsl.org/>
4. <https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/>
5. <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>
6. Id. ICC Statute, 9th preambular paragraph
7. Id. 7th preambular paragraph
8. Press Release GA/L/3044 dated 21 Oct. 1997 <https://www.un.org/press/en/1997/19971021.GAL3044.html>

9. Id. Article 115(b)
10. Id. article 112
11. "Challenges to the Independence of the International Criminal Court from the Assembly of States Parties" by Hannah Woolaver, Emma Palmer, *Journal of International Criminal Justice*, Volume 15, Issue 4, September 2017, Pages 641–665 <https://doi.org/10.1093/jicj/mqx022>
12. "The International Criminal Court Needs Fixing" Atlantic Council April 24, 2019, by Prince Zeid Raad al Hussain, Bruno Stagno Ugarte, C WENAWESER, AND TIINA INTELMAN
13. <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing>
14. UN General Assembly Plenary 73rd Session, 27th and 28th meetings, 29 Oct. 2018, GA/12084 <https://www.un.org/press/en/2018/ga12084.doc.htm>. See also Dore Gold "America and the International Criminal Court" April 18, 2019 <https://jcpa.org/video/america-and-the-international-criminal-court/>
Theodor Meron "Judicial Independence and Impartiality in International Criminal Tribunals" *The American Journal of International Law* Vol. 99, No. 2 (Apr., 2005), pp. 359-369
15. <https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>
16. <https://unispal.un.org/DPA/DPR/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/19862d03c564fa2c85257acb004ee69b?OpenDocument>
17. Ibid para. 5
18. Article 12 of the Statute determines that only States party to the Statute and having accepted the court's jurisdiction, may invoke the court's jurisdiction. Similarly, all three subparagraphs of article 125 of the ICC Statute, dealing with signature, ratification, acceptance, approval or accession to the statute, specifically refer only to states
19. Israeli-Palestinian Interim Agreement 1995, Article XXXI(7) <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>
20. See in this context Alan Baker "Palestinian Manipulation of the International Criminal Court", January 21, 2018 <https://jcpa.org/will-the-international-criminal-court-disregard-international-law/> and "The International Criminal Court's Decision on Alleged U.S. Crimes in Afghanistan: Implications for Israel" April 30, 2019 <https://jcpa.org/the-international-criminal-courts-decision-on-alleged-u-s-crimes-in-afghanistan-implications-for-israel/>
21. "The ICC will continue its independent and impartial work, undeterred" <https://www.icc-cpi.int/Pages/item.aspx?name=pr1406>

IS THE INTERNATIONAL CRIMINAL COURT BECOMING A PALESTINIAN PROPAGANDA ENGINE?

Amb. Alan Baker

The Palestinians have undertaken a regular mode of ceremonially issuing complaints to the International Criminal Court against Israeli leaders and military commanders regarding virtually everything Israel does.

These are clearly a series of public relations exercises as part of their “lawfare” against Israel.

In fact, they are trying to politicize this international court and turn it into their own “back-yard tribunal” to hassle Israeli leaders and senior military commanders.

In a recent unprecedented and uncalled-for determination by one of the court’s pre-trial chambers over a month ago, they ordered a campaign of outreach to Palestinian victims, “within or outside of Palestine” to better assist the court in their communicating and interacting with the court. The aim is also “to better understand their rights, to assist the court in fulfilling its role and to better advance the interests of justice and protect the rights of victims” (paragraph 12 of the decision).

The decision presents such outreach activities as an attempt aimed to “clearly indicate the general parameters of the Court’s jurisdiction in relation to the situation in Palestine.”

Does the Court Even Have Jurisdiction?

This is even more curious in light of the fact that the court has yet to decide whether it indeed has any jurisdiction whatsoever regarding the Palestinian complaints, and whether a non-state can indeed be a party to the ICC statute.

Paragraph 4 of the decision recites the Palestinian initial submission referring to the Court’s jurisdiction to investigate crimes – past, ongoing, and future within the court’s jurisdiction, committed “in all parts of the territory of the State of Palestine... comprising the Palestinian territory occupied in 1967 by Israel, as defined by the 1949 Armistice Line, and includes the West Bank, including East Jerusalem, and the Gaza Strip.”

The Chamber is thus ordering the creation of an “informative page on the Court’s website, especially directed to the victims of the situation in Palestine”(paragraph 16), as well as a three-monthly reporting mechanism!

This is quite amazing and unprecedented, and the court is openly turning itself into a Palestinian propaganda engine, similar to the UN Human Rights Council, with a regular reporting regime on Palestine and a distinct section of its website devoted to Palestine.

All this despite the fact, referred to in the decision that *the Prosecutor has yet to decide to open an investigation on the Palestinian complaints*.

Similarly, despite the fact that no juridical body of the court has determined that it has jurisdiction over territory that is not held by the Palestinians, the permanent status of the territory has yet to be agreed upon pursuant to the still valid Oslo Accords, to which the Palestinians are committed and the international community has endorsed.

What “State of Palestine?”

Similarly, this measure ignores the basic question whether, pursuant to the ICC Statute, a “State of Palestine” can be party when no Palestinian state exists, apart from in a non-binding General Assembly upgrade recommendation, which is far from being a legal ground for acceptance.

All this indicates that the ICC is venturing far, far beyond its role and is being politically manipulated – or is manipulating itself – against its own better interests.

It is to be hoped that the responsible Israeli, American, and other serious authorities will approach the Prosecutor criticizing this decision, stressing that it implies a prejudgment and runs against the principles behind the very concept of the ICC.

The court’s actions damage the credibility and reputation of the court as a serious international objective juridical body.

PALESTINIAN MANIPULATION OF THE INTERNATIONAL CRIMINAL COURT

Amb. Alan Baker

According to an Israeli television news report on January 9, 2018,¹ the Israeli prime minister's National Security Council recently cautioned the Knesset Foreign Affairs and Security Committee that the Prosecutor of the International Criminal Court (ICC) will likely open a formal investigation against Israeli officials and officers in response to Palestinian complaints regarding Israel's 2014 "Protective Edge" operation in the Gaza Strip and Israel's building of settlements in the West Bank areas of Judea and Samaria.

According to this report, "The opening of an investigation has serious implications for Israel. It will be directed against people and could involve warrants for investigations and arrests."

The report refers to differing views within Israel's justice and foreign affairs ministries as to the seriousness of this issue, it holds that these ministries nevertheless view the matter with concern and appreciate the need to deal with it at the legal and political levels to remove the threat.

It is unclear if the fears of the Israeli National Security Council are based on solid information emanating from the Office of the ICC Prosecutor, or merely on conjecture. However, there exists a certain lack of knowledge and awareness among Israeli government officials, and even more so among the Israeli media, as to the details and procedures of the ICC and its Statute.

This is all the more evident regarding the legality of the Palestinian status vis-à-vis the ICC and of their complaints to the court.

The following observations deal with some of the legal and political aspects of the issue.

Jurisdiction of the ICC regarding "Palestine"

The Statute of the ICC clearly establishes that it is open to signature/accession by states only.²

The Palestinians consider themselves to be a sovereign state with defined territory, and as such, entitled to be a party to the ICC Statute. On the strength of that, they have entered complaints against Israelis for crimes allegedly committed on sovereign Palestinian territory.

Their assumption relies on UN General Assembly Resolution 67/19 of December 4, 2012, which accorded “to Palestine non-member observer State status in the United Nations.”³

This resolution was a political, non-binding General Assembly resolution. The UN General Assembly does not have the legal capacity, pursuant to the UN’s Charter, to establish states, but only to accept existing states pursuant to a recommendation of the Security Council.⁴ However, the Palestinians view this resolution as the source of authority for their accession, as a fully-fledged state, to the ICC statute and to membership of the court, as well as to other international treaties and organizations.

The ICC Intercedes

Despite the lack of any valid legal foundation for this assumption, the international community has, in general, accepted the resolution as granting statehood to the Palestinians. In fact, in a statement by the ICC Prosecutor Fatou Bensouda, dated February 9, 2014, entitled “The Public Deserves to know the Truth about the ICC’s Jurisdiction over Palestine,” the Prosecutor, in referring to General Assembly Resolution 67/19, stated:

*The Office of the Prosecutor examined the legal implications of this development for its purposes and concluded that while this change did not retroactively validate the previously invalid 2009 declaration lodged without the necessary standing, Palestine could now join the Rome Statute.*⁵

This conclusion is legally puzzling in light of the clear lack of legal authority for the UN General Assembly to declare statehood.

However, on the strength of this ICC prosecutorial green light, on December 31, 2014, the Palestinians formally recognized the Court’s jurisdiction

*for the purpose of identifying, prosecuting and judging authors and accomplices of crimes within the jurisdiction of the Court committed in the occupied Palestinian territory, including East Jerusalem.*⁶

They proceeded to present to the court their complaints regarding crimes committed in their view by Israelis on their territory.

On January 5, 2015, the ICC announced its acceptance of these complaints and proceeded to open a preliminary examination, stating that

*Acceptance of the ICC’s jurisdiction does not automatically trigger an investigation. It is for the ICC Prosecutor to establish whether the Rome Statute criteria for opening an investigation are met and, where required, to request authorisation from ICC Judges.*⁷

On January 6, 2015, the UN Secretary-General announced his acceptance of the “State of Palestine” as a fully-fledged state party to the ICC Statute.⁸

It is this factual situation that forms the basis of the evaluation by the Israeli National Security Council according to which the Prosecutor will likely open a formal investigation in 2018.

Observations and Questions

The fact that the UN Secretary-General and the ICC Prosecutor accepted the “State of Palestine” as party to the ICC statute enabled the Prosecutor to open a preliminary examination of the Palestinian complaints. However, there is a legal question as to whether acceptance of “Palestine” as a state, on the strength of a political, non-binding General Assembly resolution, duly follows the accepted criteria in international law for statehood and fulfills the definition of a state as required by the ICC statute.

International law does not recognize General Assembly resolutions as a source of legal authority for granting statehood. Following on from this, the Palestinians cannot give jurisdiction to the ICC over territory over which they do not exercise sovereignty and jurisdiction, and which is subject to an ongoing dispute and negotiation as to its final status.

In this context, one may ask how the ICC, as a juridical institution established on the basis of legal principles and norms, could, in light of the requirements of its statute, rely on a political, non-binding resolution of the General Assembly as a source of authority for accepting a non-state entity claiming to be a state?

The decision to accept “Palestine” as a party to the ICC statute, and to accept Palestinian complaints against Israel was rejected as illegal by the U.S. Administration, and the U.S. Congress adopted a resolution to the same effect on May 18, 2015.⁹

A further legal question is how is it possible to impart to the ICC legal jurisdiction over disputed territory, the sovereign status of which has yet to be agreed upon between the parties to the dispute?

In this context, the Palestinian leadership and Israel agreed in the 1993-5 Oslo Accords that the permanent status of the territories would be resolved by negotiation between them and not through unilateral action or imposition by international bodies. The Oslo Accords were witnessed by international leaders including the United States, Russia, the EU, Egypt, Jordan, and Norway, and the Accords were endorsed in UN resolutions.¹⁰

Conclusions

In light of the lack of any valid legal basis to the Palestinian claim to statehood, and in light of the fact that Palestinians' status, and that the status of the territories are under ongoing dispute and negotiation, there can be no legal or logical foundation to accept "Palestine" as party to the ICC statute. Thus, there is no basis for extending the court's jurisdiction over the territories under dispute, pending resolution of the dispute and the determination, by agreement, of their final and permanent status.

Lacking any legal foundation, the Palestinian complaints – regarding both the "Protective Edge" operation and Israeli settlements – must, therefore, be rejected by the ICC.

The ICC statute renders inadmissible any case that has been duly investigated¹¹ and, as necessary, prosecuted by the legal authorities of the state concerned.¹² The appropriate legal and law enforcement authorities in Israel maintain the highest international standards, in fitting with the norms and requirements set out in the ICC Statute.

However...

Despite the legal logic set out above, political realities may nevertheless intervene in the functioning of the ICC regarding the issue of the Palestinian status *vis-à-vis* the court and the Palestinian complaints:

- » The Court, according to the provisions of its statute, was established as an independent juridical institution whose judges and prosecutor are expected to be impartial and independent in the performance of their functions.¹³ However, the negotiation and drafting of the ICC Statute, like any international instrument, was a political process with the concomitant political pressures and compromises involved in such processes.
- » Political manipulation in the drafting of provisions of the Statute, including the content of the listing of crimes which are part of the court's jurisdiction, resulted in the refusal of certain states, including Israel, Russia, and the United States, to become party to the Statute.¹⁴
- » The judges of the Court and its prosecutor, "*persons of high moral character, impartiality and integrity*,"¹⁵ are chosen by their national states and elected by the "Assembly of States Parties," an international organization established by the ICC Statute, which functions, votes and manages the administration of the Court.¹⁶ Like any other international organization, it functions on the basis of UN geographical groupings and the usual political bargaining and pressures that typify international organizations.
- » Having been accepted by the UN and the Court's prosecutor as a state party to the ICC Statute, the Palestinian leadership has assumed that the Court will thus extend

its jurisdiction to war crimes allegedly committed by Israelis in what they claim as the “Palestinian territories occupied by Israel.” The Palestinians repeatedly and visibly submit complaints against Israel to the ICC, treating the court as if it is their own, backyard tribunal.

It remains to be seen whether the ICC will allow itself to be politically manipulated by the Palestinians and by prevailing political pressures, as part of the Palestinian “lawfare” campaign against Israel.

Or, to the contrary, whether it will assert its legal authority as the responsible international juridical institution it was intended to be and, based on clear, objective legal reasoning, will reject the Palestinian manipulation.

In this context it is noteworthy to quote the words of the ICC Prosecutor on the issue of political manipulation of the ICC, in the hope that the court will indeed act accordingly:

By the very nature of the Court’s mandate, every situation in which I act in my capacity as ICC Prosecutor will be politically fraught. My mandate as Prosecutor is nonetheless clear: to investigate and prosecute crimes based on the facts and exact application of the law in full independence and impartiality.

Whether States or the UN Security Council choose to confer jurisdiction on the ICC is a decision that is wholly independent of the Court. Once made, however, the legal rules that apply are clear and decidedly not political under any circumstances or situation. In both practice and words, I have made it clear in no uncertain terms that the Office of the Prosecutor of the ICC will execute its mandate, without fear or favour, wherever jurisdiction is established and will vigorously pursue those – irrespective of status or affiliation – who commit mass crimes that shock the conscience of humanity. The Office’s approach to Palestine will be no different if the Court’s jurisdiction is ever triggered over the situation.

It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities. This, we will never allow.¹⁷



Notes

1. <https://www.10.tv/news/152363>
2. ICC Statute, Preamble and Article 125. For the full text of the ICC Statute see https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
3. Article 2, General Assembly resolution 67/19 entitled “Status of Palestine in the United Nations” <https://unispal.un.org/DPA/DPR/unispal.nsf/0/19862D03C564FA2C85257ACB004EE69B>

4. UN Charter, Article 4(2) <http://www.un.org/en/sections/un-charter/un-charter-full-text/>
5. <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7E3608E6EB326FE85257E6E005BAD82>
6. https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf
7. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1080&ln=en>
8. UN document C.N.13.2015.TREATIES-XVIII.10 (Depositary Notification)
9. H. RES. 270 "Expressing the sense of Congress regarding the Palestinian Authority's purported accession to the International Criminal Court for the purpose of initiating prosecutions against Israeli soldiers, citizens, officials and leaders." <https://www.congress.gov/bill/114th-congress/house-resolution/270/text> See also https://www.washingtonpost.com/world/palestinians-join-international-criminal-court-to-fight-israel/2015/04/01/e6b79c78-d70c-11e4-bf0b-f648b95a6488_story.html?utm_term=.990f5099a7d8
10. See Oslo Accords <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israel-PLO%20Recognition%20-%20Exchange%20of%20Letters%20betwe.aspx> See also <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Declaration%20of%20Principles.aspx> and <http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT.aspx>
11. Olympia Bekou, *Complementarity Principle*, "Complementarity governs the relationship between the ICC and national legal orders. Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where states are unable or unwilling genuinely to investigate or prosecute, without replacing judicial systems that function properly. 'Unwillingness' and 'inability' are key concepts in the determination of the admissibility of a case before the ICC." <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0071.xml>
12. ICC Statute, Articles 17 and 18 on "Issues of admissibility."
13. ICC Statute, Preamble, Articles 1 (the Court), 36, 40 (judges) and 42 (Prosecutor)
14. See for instance Article 8, Paragraph 2(b) listing acts considered to be "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". The proviso that the violations listed are based on the "established framework of international law" was intended to ensure that they indeed reflect the established framework of international law.
However, during the negotiation of the Statute, Arab states nevertheless manipulated and altered subparagraph viii relating to the transfer by an occupying power of civilian population into the occupied territory. They added to the existing, accepted international law terminology appearing in article 49(6) of the 1949 Fourth Geneva convention, which refers to "transfer of parts of its own civilian population into the territory it occupies" the three words "directly or indirectly", in an attempt to render the provision distinctly applicable to Israel's settlement policy.
This manipulated terminology was adopted into the Statute through political pressures by the Arab states, despite the objections of Israel and others.
15. ICC Statute, Article 36, Paragraph 3(a) (judges) and Article 42 Paragraph 3 (Prosecutor)
16. ICC Statute, Article 112
17. See ICC Prosecutor's statement of 9 February 2014 at note 5 above, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F7E3608E6EB326FE85257E6E005BAD82>



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